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Yearly Legal Report on e-commerce and digital  
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Electronic Contracts. Last developments on  
electronic commerce and consumer protection.

The popular legislative initiative process through  
digital signatures

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# **ELECTRONIC CONTRACTS. LAST DEVELOPMENTS ON ELECTRONIC COMMERCE AND CONSUMER PROTECTION**

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## **1. Abstract**

New Proposal for a Directive of the European Parliament and of the Council on Consumer Rights regulates distance contracts, and specially, electronic contracts and consumer rights. Regulation of the duty to inform and, specially, in the cases of small display devices as mobile phones and the right of withdrawal are very interesting. Now, the consumer will have a period of 14 days to withdraw from a distance contract, without giving any reason.

On the other hand, some problems that may occur with the use of social networking from the point of view of protecting the rights of users will be analyzed in this deliverable. Specially, we studied indirect uses of social networks data, including sending advertisements by third parties, use of the information contained in profiles for personalized marketing, etc.

## **2. Regulatory Developments in the Field of Electronic Commerce and Consumer Protection**

The Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (Brussels, 8.10.2008. COM(2008) 614 final) regulates the rights of consumers in distance contracts. These rules are applied to the electronic commerce. So, the whereas 5 says: *“The cross-border potential of distance selling which should be one of the main tangible results of the internal market is not fully exploited by consumers. Compared with the significant growth of domestic distance sales over the last few years, the growth in cross-border distance sales has been limited. This discrepancy is particularly significant for Internet sales for which the potential of further growth is high...”*.

The Proposal presents a new definition of “distance contract”. It should cover all cases where sales and service contracts are concluded using exclusively one or more means of distance communication (such as mail order, Internet, telephone or fax). This should create a level playing field for all distance traders. It should also improve legal certainty as compared to the current definition requiring the presence of an organised distance selling scheme run by the trader up to the conclusion of the contract. So, article 2 (7) of the Proposal defines “distance contract’ as *“any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communications”*.

Article 11 is about formal requirements for distance contracts:

- The information provided in Article 9(a) shall be given or made available to the consumer prior to the conclusion of the contract, in plain and intelligible language and be legible, in an appropriate way for the means of distance communication used.

- If the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide at least the information regarding the main characteristics of the product and the total price referred to in Articles 5(1)(a) and (c) on that particular medium prior to the conclusion of such a contract. This is important in the case of contracts concluded by small display devices.

It is important that the information requirements should be adapted to these small devices, for instance certain mobile screens. In this case the trader should comply with a minimum set of information requirements and refer the consumer to another source of information (webpage, free telephone number,...).

- The other information referred to in Articles 5 and 7 shall be provided by the trader to the consumer in an appropriate way.

- On the confirmation of the information: the consumer shall receive confirmation of all the information referred to in Article 9(a) to (f), on a durable medium, in reasonable time after the conclusion of any distance contract, and, at the latest, at the time of the delivery of the goods or when the performance of the service has begun unless the information has already been given to the consumer prior to the conclusion of any distance contract on a durable medium.

Articles 12 to 19 refer to the right of withdrawal in distance contracts: the consumer shall have a period of fourteen days to withdraw from a distance contract, without giving any reason. For the exercise of the right of withdrawal in the case of distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case, the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

### **3. Marketing, social networks and users protection**

#### **3.1. Introduction**

Main problems that may occur with the use of social networking from the point of view of users protection will be analyzed in this deliverable. Specially, we studied indirect uses of the data collected in social networks, including sending advertisements by third parties, use of the information contained in profiles for personalized marketing, etc .

The Report of the Social Networking Protection Data Agency refers to the lack of knowledge in the use of these Internet technologies, adding the small print of the general terms and illegible clauses of the contract for the installation of software that contributes significantly to this problem. The issue of user consent terms is not a new issue. It has been raised with the installation of certain software that can retrieve data from the user, whose installation can even ignore (as spyware, web bugs or mail bugs). The software installation in these conditions does not fulfil neither the requirements of the Spanish Data Protection Act for the treatment of personal data nor the legislation on the duty to inform of consumer protection legislation.

### **3.2. Indirect uses of personal data in social networks. Special reference to the advertising.**

The report of the Spanish Agency for Data Protection declares, in relation to the advertising, that social networks have several risks: social spam or spammer, other types of advertising and installation and use of cookies without the knowledge of users. For this reason, some questions arise: Can social networks use personal data to send advertising? What happens when a third party obtains data of the users?

The large amount of data flowing in settings of social networks can be particularly interesting to send targeted advertising to the users. An example of targeted advertising, in the general terms of some of these social networks is the following: "... may use information in your profile without identifying any third party individual. This is done with purpose to establish how many people in a network like a group or a movie, and to customize ads and promotions. We believe this is beneficial for you since you can be better informed about what is happening around you. When ads appear they are more likely to be of yours interest". It is essential that the social networks providers always explicit report on the use of data and information posted in your profile.

As mentioned above, social networks appear to be important sources of information for marketing companies. The problem may arise in the use of certain personal information or in

how to use it (*between the terms of "myspace": "...It is forbidden the use of illegal and / or unauthorized use of the MySpace Services, including collecting usernames user, user identification numbers and / or email addresses of Members by electronic or otherwise, to send spam, perform framing (framing of pages) or links to the Site MySpace without authorization, or use promotional sites or third-party software to promote profiles for money ... "*). Remember that it will require the consent of the user to use their personal data. This consent in social networking is about getting to the acceptance of general terms.

In other cases, the use of cookies: "... store certain information from your browser using cookies ... We may use information about you that we collect from other sources including, inter alia, newspapers and Internet sources such as blogs, services instant messaging, ...Platform developers and other users of..., to supplement your profile". This clause raises several issues: the use of cookies, the question of consent given through the acceptance of general conditions and moreover, the possibility to use user data from other sources. The issue, which has been raised on other occasions, is that the Internet is not a publicly available source and to use it, user data is necessary. Once again, his consent is required in accordance with the rules of protection of personal data. The that question arises once again is whether the acceptance of this clause may amount to consent for the processing of personal data.

But now, in "Facebook", this clause appears: *"We never share your personal information with our advertisers. Facebook's ad targeting is done entirely anonymously. If advertisers select demographic targeting for their ads, Facebook automatically matches those ads to the appropriate audience. Advertisers only receive anonymous data reports"*.

The Ethical Code of Electronic Commerce and Interactive Advertising in Article 25 and states: "It may be used newsgroups, boards or forums or chat to capture data for advertising purposes unless such collection conforms to data collection standards set out in this Code." As an example, we can raise some questions: whether to send targeted advertising based on data from the "user profile", do you understand that there is consent of the person concerned to the use of these data? Does that mean she has given his consent to accept the "conditions"? Is it enough?

Canada has already raised a claim against a particular network. According to the raised plaintiffs that network provides personal information to third parties for marketing purposes without the consent of users. This would mean the violation of Canadian law on the protection

of personal data. According to the Spanish law, that would result in a transfer of data to third parties so that we would need the consent of the affected, according to Article 11 of the Spanish Data Protection Act.

Besides, the problem of the consent of the general terms contained in the clauses related to the privacy of social networks is important. The question of technology is very important too, especially the configuration of the browser and the privacy settings on social networks.

The Working Group of Article 29 in its Opinion 5/2009 was opposed to the default browser settings to be understood as permission to obtain personal data. Browser's default settings should be respectful of privacy. This document affirms that: *“an important element of the privacy settings is the access to personal data published in a profile. If there are no restrictions to such access, third parties may link all kinds of intimate details regarding the users, either as a member of the SNS or via search engines. However, only a minority of users signing up to a service will make any changes to default settings. Therefore, SNS should offer privacy-friendly default settings which allow users to freely and specifically consent to any access to their profile's content that is beyond their self-selected contacts in order to reduce the risk of unlawful processing by third parties. Restricted access profiles should not be discoverable by internal search engines, including the facility to search by parameters such as age or location. Decisions to extend access may not be implicit, for example with an "opt-out" provided by the controller of the SNS”*.

On the other hand, there is the problem of search engines and data profiles. In this case, the users themselves should allow these search engines to index the data profiles. Now, “Facebook” refers to this subject with the following clause: *“Public search” on the Applications and Websites page controls whether people who enter your name in a search engine will see a preview of your Facebook profile. It also controls whether things you've specifically chosen to share with everyone show up in searches on and off Facebook”*.

Another issue of particular interest is the use of free services on the Internet. Does the use of free services on the Internet imply the use of data for sending advertising? Spanish Data Protection Agency in the case 442/2004 and 1544/2007 established that the registered user of Gmail service provided explicit consent for the processing of personal data for targeted advertising partnership because it was the compensation for the free provision of service.

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# **THE POPULAR LEGISLATIVE INITIATIVE PROCESS THROUGH DIGITAL SIGNATURES**

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## **5. Abstract**

In Spain, the Constitution passed in 1978 recognizes the so-called Popular Legislative Initiative -ILP, consisting of a process whereby citizens can submit bills signed by a minimum number of signatories. With the advent of electronic signature devices, ILP processes may suffer a major transformation since the possibility of collecting digital signatures can be very versatile. This report analyzes, from a legal standpoint, how the collection of signatures by digital mechanisms can affect the ILP.

## **6. Introduction**

The Spanish Constitution (art. 87.3) admits the direct participation of citizens in the process of production of rules, setting the people, by submitting 500,000 signatures, as the subject of legislative initiative. This participation is regulated by the Organic Law 3/1984, regulating the Popular Legislative Initiative (LOILP). This Law, after being amended by Organic Law 4/2006, includes a new art. 7.4, which states, regarding the nature of the signatures collected, that electronic signatures may also be collected according to appropriate legislation. Recently, the possibility of electronic signatures collected for popular legislative initiatives is confirmed in the meeting of the Central Electoral Board (Junta Electoral Central, JEC) September 17, 2009.

Therefore, in view of the foregoing, it can be argued that there is a legal framework to declare in general terms the legal admissibility of a collection of signatures by electronic means. From this generic admissibility, the purpose of this report is assessing compliance with various requirements set in concrete law for the development of an ILP if this takes place electronically.

## **7. Legal analysis of the procedure for collecting signatures**

Under art. 7 LOILP, once supported the proposal by the Bureau of Congress, the process of collecting signatures can begin. Next, different issues are faced in the light of the specific regulation of the signature collection procedure and caused by electronic nature of signatures.

### **7.1. Previous formal requirements: The sheets for the collection of signatures.**

Under the LOILP (art. 8), and the case of traditional handwritten signature collection, the first action of the Promoting Commission, once accepted the proposition, is submit to the Central Electoral Board (Junta Electoral Central, JEC) the sheets used for the collection of signatures. The sheets must be stamped and numbered.

In the event of digital signatures, we start from the assumption that the purpose of such requirements is avoid manipulation, false statements or misleading. In the electronic environment, we believe that similar guarantees could be achieved if the full text of the legislative proposal is signed by the Central Electoral Board (Junta Electoral Central, JEC) which also includes the time stamp for the signature. We consider that the signature included in the digital sheets is the functional equivalent of requirement article 8; and the signature of the JEC, together with requirements, prevents any manipulation of the content of the proposal. Moreover, the requirements of art. 8 (sheets must reproduce the full text of the proposal), have the purpose of the signatories have full knowledge on the initiative signed. We also consider that this can be achieved and even more fully and effectively in electronic ILP, including in the data collection page (the “electronic sheet”) a link to the proposal, or even setting it as mandatory page that the signatory must see.

On the other hand, the temporary problem must be solved because only the signatures collected in due time are valid. Hence, the proof of the time of the signature is important and it is proved with timestamps.

### **7.2. Time of signature.**

Citizens who wish to support the proposed legislative initiative must digitally sign the digital sheet. The question is the kind of electronic signatures that can be legally used.

At this point, we must refer to the Agreement of the Central Electoral Board (JEC) May 28, 2009 which is its first ruling on the use of digital signature in the development of ILP. This agreement states that the Promoting Commission must notify the JEC the system of electronic signature that is going to be used, and the Promoting Commission must also provide to the Central Electoral Board (JEC), if it were necessary, the system used for verification of electronic signatures." We think the purpose of this communication is the validation by the Board (JEC) of the legal validity of the signature system.

Note, then, that the Electoral Board does not establish the requirements that generally must be met by digital signature system for ILP; Electoral Board prefers, by the moment, the mechanism of previous notice and approval for each case.

Therefore, this first agreement of the Central Electoral Board (JEC) is followed by another agreement of January 18, 2010 which places us as the prior notification of a particular digital signature system, a Promoting Commission, in particular the Promoting Commission of ILP Tajo-Segura that seeks to use new technologies for collecting signatures and seeks the approval of the JEC. Such approval is granted by the Central Electoral Board (JEC) with a previous report of the Electoral Roll Office (which, according to the LOILP, is involved in the verification and counting of the signatures collected).

After this procedural aspects related to the authorization of the signature system, we focus now on substantive issues related to the type of signature admissible. In Spain, the Law 59/2003 of the 19<sup>th</sup> of December rules electronic signatures and, among the various categories of electronic signatures ruled by Law, supports the use of the so-called "recognized electronic signature" that is legally equivalent to the handwritten signature (under art. 3 of Law 59/2003). Particularly interesting regarding electronic ILP is the so-called E-DNI (Electronic National Identity Document), ruled by Art. 15 and 16 of Law 59/2003 and Royal Decree 1553/2005 of the 23<sup>rd</sup> of December. Attending to the security offered by the signature incorporated to the E-DNI, and attending to current spread of the electronic E-DNI, we consider it is a particularly appropriate instrument for collecting digital signatures for the development of an ILP.

## **8. Conclusions**

From the legal point of view, under Spanish law the explicit recognition, under art. 7.4 LOILP, of the admissibility of digital signatures collected for the development of a popular legislative initiative is positive.

However, there are still no detailed regulations governing the requirements to be met for the collection of signatures. It is true that the Central Electoral Board (JEC) has ratified its admissibility, but it has not established general and previous requirements that should be met by all platforms. At this early stage of development of the collection of digital signatures for the development of popular legislative initiatives, the Promoting Commission has the obligation to notify the Electoral Board (JEC) the signature system that seeks to use in each case. Hence, for the future, it is desirable the prior establishment of the requirements to be met either through the regulation of the development of the Organic Act (LOILP), or through the statement of the Central Electoral Board (JEC).

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