

5-1-2009

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Recommended Citation

Barral, Immaculada (2009) "Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet," *Penn State International Law Review*: Vol. 27: No. 3, Article 4.
Available at: <http://elibrary.law.psu.edu/psilr/vol27/iss3/4>

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Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet

Immaculada Barral*

INTRODUCTION

This paper discusses the European Union's ("EU's") excessively narrow definition of the concept of "consumer" in the context of new e-commerce contracting types. Due to the fact that the concept of "consumer" is narrow, the consumer concept in EU regulation is not as useful in the domain of new contracting types born in e-commerce.

I discuss two examples of this loss of usefulness. First, I examine the extent and effects of the changes in information requirements for this new platform of e-commerce. Pre-contractual information is a central aspect of consumer protection. In e-commerce, such pre-contractual information must be extended to all parties, regardless of whether or not they are consumers. Therefore, the concept of "consumer" should include all parties that are weaker because they are not experts. This includes, for example, any contractor participating in a "clickwrap" agreement. Second, I discuss new e-commerce practices, specifically, online auctions. In this case, I try to find an integral solution for practices that are breaking down the traditional meaning of consumer and trader relations.

Parts one and two of this paper deal with the concept of the consumer as a non-expert in mass contracts and analyzes information requirements. I then focus in part three of this paper on the two main challenges to the narrow concept of the consumer: how information requirements are extended to non-consumers within e-commerce and how EU contract law advances a step beyond legal principles for information. In part four the question of whether e-commerce

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regulations constitute a special consumer law or whether there are already major problems with this new mode of action, is discussed.

I. MODERN RATIONALES OF CONSUMER CONTRACTS: MASS CONTRACTS AND THE INSTITUTIONALLY WEAKER PARTY

The nineteenth-century Spanish Civil Code is based on the liberal doctrine. In this Code, freedom of contract is the core scope of contract regulation; there are no limits to commercial transactions because there is no control by guilds or professional corporations. Only articles 1254 to 1260 of the Spanish Civil Code cover the general theory of contracts in a context in which the parties are assumed to have equal bargaining power and are free to discuss any aspect of the contract. The two main principles of traditional transactions include: equality between the two contracting parties;¹ and the freewill or autonomy of the parties.² Nevertheless, this approach and rationale do not reflect how contracts are formed in the modern context of consumer transactions.

The idea that one party in a contract is weaker than the other means that there is an imbalance which, to some extent, limits the freedom of contracts. This is particularly true of mass contracts. Such contracts are changing the bases of the traditional contracting process in which there was freedom of contracts and equality between parties. The liberal doctrine of equality between the parties assumes that transactions are carried out with a level of equality that does not exist today.

The weaker party in modern transactions is normally considered to be the consumer.³ Therefore, the concept of consumer protection comes from the unequal bargaining power that breaks down the ancient dogma of equality. In this respect, as Ramsay states, consumer law faced the materialisation and differentiation of contract law in the twentieth century⁴ “due to the breakdown of the formal system of contract law as an autonomous system of law that assumed a basis of formal equality between contracting parties.” In the author’s opinion, the EU consumer *acquis* applies a rather strict concept of the consumer as a natural person who is acting for purposes that are outside the scope of his/her trade, business or profession.⁵

1. See Código Civil (C.C.) arts. 1254, 1256 (Spain).

2. See *id.* art. 1255.

3. See Ewoud Hondius, *The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis*, 27 J. CONSUMER POL’Y 245 (2004).

4. See IAIN RAMSAY, *CONSUMER LAW AND POLICY: TEXT AND MATERIALS ON REGULATING CONSUMER MARKETS* 166 (2d ed. 2007); see also FRANZ WIEACKER, *HISTORIA DEL DERECHO PRIVADO EUROPEO* 230 (1957).

5. This is the exact definition of Council Directive 97/7/EC, art. 1, 1997 O.J. (L 144) (EC) [hereinafter Distance Selling Directive]. One can find similar definitions in other main directives, including Council Directive 85/577/EEC, art. 2, 1985 O.J. (L 372)

However, I consider that the concept of “consumer” is broader than that of the non-professional as defined in EU law. If we want to protect the weaker party from unfair agreements, the consumer must be considered as any non-expert acting in what I will call “mass contracts.”⁶

In my view, consumers must be protected not because they are non-professionals, but because they are non-experts. Consequently, consumers will always be considered the weaker party that needs special regulations. This idea is not highly compatible with the freedom of contract in Article 1255 of the Spanish Civil Code. The EU’s narrow concept of a consumer cannot fulfill the expectations of subjects such as small enterprises or farmers. Therefore, the Study Group on a European Civil Code has suggested that small businesses should, at least in some cases, be included in the consumer definition.⁷ This approach was supported by the Advocate-General in the *Pinto* case, but rejected by the European Court.⁸ Nevertheless, it has been admitted in some national courts, for example in France, Italy,⁹ and Spain.¹⁰ I will focus on the Spanish case.

In all these cases, the courts stressed that enterprises can be treated as the weaker party in business transactions. Thus, small businesses can rely on existing consumer protection when they execute their normal business affairs. This extension of the consumer concept is justified by the fact that small businesses are non-experts in specific fields. For example, in the above-mentioned Spanish court case involved a hospital whose contract with an elevator service included unfair contract terms. The hospital was not an expert in this agreement, since elevator services were outside the scope of the hospital’s normal trade, and the hospital was therefore in a weaker position as compared with the trader.

This broader concept of the consumer is based on the idea of protecting the weaker party, which is any party that can be considered a non-expert in a contract. In this respect, Weatherill—referring to the

(EC) [hereinafter Doorstep Selling Directive]; Council Directive 87/102/CEE, art. 1(2)(a), 1986 O.J. (L 042) (EC); and Council Directive 94/47/EC, 1994 O.J. (L 280) (EC) [hereinafter Timesharing Directive].

6. See Immaculada Barral Viñals, *Del Consumidor-Destinatarí Final al Consumidor-No Expert en la Contractació En Massa*, 7 REVISTA CATALANA DE DRET PRIVAT 69 (2007).

7. See Johnny Herre, Ewoud Hondius & Guido Alpa, *The Notions of Consumer and Professional and Some Related Questions*, from the Task Force on Consumers and Professionals, Study Group on a European Civil Code, available at http://www.sgecc.net/media/downloads/consumers_and_professionals.pdf.

8. Case C-361/89, Republic v. De Pinto, 1991 E.C.R. I-1189.

9. See Herre et al., *supra* note 7, at 11 nn. 21, 22 (citing the French and Italian cases).

10. SAP de Burgos, Feb. 15, 2001 (R.A., No. 875).

scope of application of the Unfair Contract Terms Directive¹¹—discusses what he calls an “irrational limitation” to consumers.¹² In fact, the remedies for contracts concluded between economically imbalanced parties can easily be applied to small business, as, Weatherill says, the power differential between such parties may be a great deal wider than that between the small trader and consumer.¹³ Consequently, normal consumer remedies—such as pre-contractual information requirements—can be applied to non-consumers in the legal sense when the non-consumers are not experts,¹⁴ for example, when the contract process is communicated electronically.

The second main character of the law that is assumed to protect consumers is related to mass contracts. Contracts are becoming standardized and offered to an unlimited range of possible contractors regardless of their individual condition or characteristics.¹⁵ However, these mass contracts are coordinated by a class of experts who rely on technological knowledge. In this case, the imbalance between the parties and the concept of protecting the weaker party comes from the idea that only one party leads the bargaining process and has the information required to impose contractual conditions.¹⁶ Consequently, control of the standard terms in a contract is limited to those terms that have not been individually negotiated, as there is a suspicion that “mass-produced” contracts cannot be fair to the other party.¹⁷ In these cases, the imbalance between the parties and the opportunities to protect the weaker party generates a legal framework that interferes with the private autonomy that we conventionally call consumer law.¹⁸

II. INFORMATION REQUIREMENTS IN CONSUMER LAW

In this scenario, **contracts are offered to a mass of non-expert contractors**. Consumer law then must reduce free bargaining power to a formal principle and generate tools to control the bargaining process and the content of a transaction with a consumer. Obviously, the rules concerning consumer protection are changing contract regulations and

11. Council Directive 93/13/EEC, 1993 O.J. (L 95) (EC) [hereinafter Unfair Contract Terms Directive].

12. See STEPHEN WEATHERILL, *EU CONSUMER LAW AND POLICY* 117 (2005).

13. See *id.*

14. See Barral Viñals, *supra* note 6.

15. See LUIS DíEZ-PICAZO, *DERECHO Y MASIFICACIÓN SOCIAL, TECNOLOGÍA Y DERECHO (DOS ESBOZOS)* 42, 50, 95 (1987).

16. For the rationales of these ideas, see Friedrich Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

17. See WEATHERILL, *supra* note 12, at 118.

18. See HUGH COLLINS, *REGULATING CONTRACTS* 228-32 (Oxford Univ. Press 1999).

their interpretation in good faith.¹⁹ Consumer law tends to avoid the imbalance between parties by focusing on two main aspects: lack of information and control of unfair terms. Both aspects deal with the concept of the consumer as an institutionally weaker party.²⁰

There is an important difference between these two aspects. Information requirements are, in terms of legal remedies, a variety of clauses and information given to consumers before they accept a contract. It is generally understood that the law tries to re-establish the balance between parties by providing the consumer with information on characteristics of the goods or service for which he/she is contracting. The scheme is based on the idea that these information requirements will make consumer assent more reliable. Another interesting tool, the unfair contract terms regulation, allows the contract conditions to be reviewed and creates the possibility of having non-binding standard terms to redress any imbalance in a business-to-consumer contract ("B2C"). In the case of a business-to-business ("B2B") contract, there is an incorporation and interpretation test, but the law does not permit content reviews. Standard terms in a B2B contract only deal with the external problem, i.e., they tend to guarantee that the other party is aware that some of the contractual terms have been prefixed by the contractor, and because of this possibility of knowledge, the terms form part of the contract.²¹ These terms are provisions that act at the same level as information requirements. However, in consumer transactions, the Unfair Contract Terms Directive²² contains provisions on content reviews for consumer contracts when the terms are considered unfair. A test of unfairness is stated in the Standard Contract Terms Act.²³ However, the content of consumer contracts must be analysed in terms of good faith and checked to ensure there is no significant imbalance between the parties' duties or rights. In such cases, the court can analyze whether a contract is enforceable or not, depending on the fairness of the agreement or the clause. Thus, a material and substantive analysis can be carried out and the imbalance between the parties or the inequality of bargaining power can render the clause unenforceable.²⁴ The only

19. See Código Civil (C.C.) art. 1258 (Spain).

20. See *Consumer Policy Strategy 2002-2006, A Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, COM (2002) 208 final (May 7, 2002).

21. See, i.e., art. 5 of the Act 7/1998 on the Condiciones Generales de la Contratación (B.O.E. 1998, 89) [hereinafter Standard Contract Terms Act].

22. See Unfair Contract Terms Directive *supra* note 11, art. 3.

23. See Standard Contract Terms Act, *supra* note 21.

24. About the relation between unfair contract terms and unconscionability, see Immaculada Barral Viñals, *Unconscionability: Freedom of Contract, Unequal Bargaining Power and Consumer Law* (draft paper presented at the Comparative Conference on

condition on contract terms is that the disputed term must be pre-formulated: the control of standard terms in a contract is limited to terms that have not been individually negotiated due to suspicion of “mass-produced” contracts. Nevertheless, this content review is not likely to differ in e-commerce transactions, except in aspects generated by the technical structure of the contract, which is a matter beyond the scope of the present paper. Therefore, I will focus on pre-contractual information requirements.

EU legislation highlights the idea that information requirements are the main focus of consumer protection.²⁵ In fact, information is aimed at complementing the market economy from the perspective of the weaker party. In other words, the function of information is to moderate the interaction between supply and demand in favor of demand. This re-establishes a certain degree of equilibrium between resources and the respective powers of companies and consumers. EU legislation has its own logic for information requirement regulations when one of the parties is legally defined as a consumer. This differential treatment is justified by evidence of the imbalance between the two parties, which leads to the need for specific solutions that only favor the “weak” party.

The application of these consumer protection regulations breaks the main principles of traditional transactions (according to a liberal economic doctrine), as stated in the Spanish Civil Code. EU legislation uses this process to redress the imbalance in transactions between company and consumer by means of information requirements involving three different tools: pre-contractual information requirements, advertisement as an integral part of the offer, and labeling prescriptions, especially for food products. It is generally understood that the law tries to re-establish a balance in order to provide consumers with information about the characteristics of contracted goods or services. Nonetheless, in these requirements, the singular claim of a consumer is normally linked to other substantive problems like contract fraud, pre-contractual liability, or voidable contracts due to misrepresentation or fraud. This brings us back to the Spanish Civil Code and its prescriptions on the elements of the contract.²⁶

Contract Law in Financial Transactions in Europe: Protecting the Vulnerable in Financial Transactions: Conceptualising Unconscionability, University of Durham (Sept. 8-9, 2008).

25. For the evolution of EU consumer law, see Paola Gozzo, *The Strategy and the Harmonization Process within the European Legal System: Party Autonomy and Information Requirements*, in INFORMATION RIGHTS AND OBLIGATIONS: A CHALLENGE FOR PARTY AUTONOMY AND TRANSACTIONAL FAIRNESS 21 (Howells Geraint, Andre Janssen, & Reiner Schulze eds., 2005).

26. See e.g., Código Civil (C.C.) arts. 1261, 1300 (Spain).

The EU is questioning the effectiveness of information that is not properly given or understood by the consumer.²⁷ In addition to this important challenge, the question of how e-commerce is using the same tools to protect the non-expert (the weaker-party) and the effectiveness of these remedies in the new way of forming contracts, must also be addressed.²⁸

III. E-COMMERCE AND NEW INFORMATION REQUIREMENTS

Information requirements are central to consumer protection and are used to regulate e-contracts. Such requirements try to empower the weaker party in the face of the complexity of the Internet. The aim of information requirements is to protect the consumer, as well as the professional or trader, who is defined as a non-expert for the first time.

The main effect of Directive 2000/31/EC²⁹ (“E-commerce Directive”) is to create a single legal system of information requirements that is applied to both B2C and B2B transactions. The goal of the E-commerce Directive is to extend consumer protection to all kinds of contracts. Consequently, Article 10 of the E-commerce Directive (Art. 27 of the Spanish E-commerce Law, LSSICE³⁰) prescribes some pre-contractual information requirements for the clickwrap agreement.³¹ Instead of saying “yes,” the contractor clicks a button on the PC to indicate his assent. In other words, as the will of the contractor is not *expressis verbis*, the legal system must confer security about the e-contract, especially to the contracting party. Pre-contractual information requirements in e-contracts are designed to build certainty about the e-contract and its terms.

27. See Consultative Document of the Directorate-General for Health and Consumer Protection, *Labelling: Competitiveness, Consumer Information and Better Regulation for the EU* (Feb. 2006), available at http://ec.europa.eu/food/food/labellingnutrition/betterregulation/competitiveness_consumer_info.pdf; see also Gillian Hadfield, Robert Howse & Michael Trebilcock, *Information-Based Principles For Rethinking Consumer Protection Policy*, 21 J. CONSUMER POL'Y 131 (June 1998).

28. See Study Group on a European Civil Code and the Research Group on EC Private Law, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* 16 (Christian von Bar, Eric Clive & Hans Schulte-Nölke eds., 2008), available at <http://webh01.ua.ac.be/storme/DCFRInterim.pdf>.

29. Council Directive 2000/31/EC, 2000 O.J. (L 178) (EC) [hereinafter E-commerce Directive].

30. Act 34/2002 on Information Society and E-Commerce Services (B.O.E. 2002, 166) [hereinafter LSSICE].

31. We have focused on the information given before an offer is accepted. Therefore, we are not referring to Articles 5 or 6 of the E-commerce Directive, *supra* note 29, that include general information about the service provider and electronic communications.

The E-commerce Directive and the Spanish Law (Art. 27 LSSICE) validate the acceptance of an offer on the Internet if the service provider meets the information requirements. Two information requirements must be met in order to recognize acceptance of electronic contracts:³²

1. Whether he/she is a consumer or not, the contractor must know how to accept the offer. Therefore the service provider must explain the different technical steps to follow to conclude the e-contract.³³ The service provider must also describe the technical means of identifying and correcting input errors prior to placing the order.³⁴ The law considers these two elements to be different. However, their aim is the same: to ensure that an offer is accepted correctly. The technical environment of the e-contract should be explained to the contractor to avoid divergence between the meaning of the party and what was finally "said" on the website with the click of a button. Such divergence may be due to problems in technical aspects, as Cavanillas Múgica³⁵ stresses. Moreover, Art. 11.2 of the E-commerce Directive deals with the duty of the service provider to provide security procedures to detect and revise errors, thus ensuring the effectiveness of the service provider's obligation to give the aforementioned information. The rule that silence is not binding because there is no intention to contract in such cases should be applied to e-contracts.³⁶

2. The service provider must give information about whether or not the concluded e-contract will be filed by the service provider and whether it will be accessible to the contractor.³⁷ This information deals with the documentation of the e-contract. The contracting party must know how the e-contract is going to be stored so the e-contract can be reproduced at a later date. Thus, e-contracts must be filed in the service provider's electronic filing system. Mention of the languages used in the e-contract ensures the effectiveness of this obligation.³⁸ The same provision applies to the terms of the e-contract and general conditions

32. See E-commerce Directive, *supra* note 29, art. 10; LSSICE, *supra* note 30, art. 27.

33. See E-commerce Directive, *supra* note 29, art. 10(1)(a).

34. See *id.* art. 10(1)(c).

35. See Cavanillas Múgica, *Informática y Teoría del Contrato*, X AÑOS DE ENCUENTROS SOBRE INFORMÁTICA Y DERECHO, 1996-1997, at 270.

36. See E-commerce Directive, *supra* note 29, art. 7; see also Immaculada Barral Viñals, *La 'Contratación Por Aía Electrónica': Adaptación del Marco Jurídico Mediante Los Principios de Equivalencia Funcional*, in EUGENIO LLAMAS POMBO, 1 ESTUDIOS DE DERECHO DE OBLIGACIONES 107 (2006).

37. See E-commerce Directive, *supra* note 29, art. 10(b).

38. See E-commerce Directive, *supra* note 29, art. 10(1)(d); see also María Rosa LLacer Matacás, *Obligaciones Vinculadas a la Formación del Contrato y Codificación del Derecho de Consumo: Información y Documentación*, in EUGENIO LLAMAS POMBO, 2 ESTUDIOS DE DERECHO DE OBLIGACIONES 172 (2006).

provided to the recipient. These must be made available in a way that enables the consumer to store and reproduce them.

Therefore, when an e-contract is passed to a consumer it must include all the information prescriptions used in this special field, i.e., it must comply with Article 4 of the Distance Selling Directive.³⁹ Moreover, the e-contract must contain all the information requirements legally stated in the E-commerce Directive, particularly those stated in Article 10. If the contractor is not a consumer, only this second set of information is required. In this case, the regulations are related to the idea that contractors are not familiar with the new e-commerce platform and therefore need extra information about the contracting process, as well as proof of the e-contract, to reestablish the imbalance between the parties. It must be stressed that it is the service provider that brings the technology to the e-contract.

Thus, information requirements are not related to the e-contract itself but to the new method of drawing up contracts on the Internet. In my opinion, the information requirements stated in Article 10 of the E-commerce Directive were not drawn up specifically to protect the consumer, but instead were based on the specificity of the electronic contract method. In e-commerce, prior information requirements are a tool for consumer protection that have been extended to all contractors. This is because in an electronic exchange of offer and acceptance there is a weaker party that must be informed. The weaker party is any contractor, whether he/she is a consumer in a legal sense, or not. The imbalance between the electronic service provider and the contractor can be explained by the same legal reasoning applied to information requirements in a consumer contract: one party can be defined as a non-expert who needs legal tuition by means of prior information requirements, in this case, about the exact contracting process.⁴⁰

However, when the weaker party is not a consumer information requirements can be excluded. Therefore, the consumer is presumed to be a non-expert in all cases, whilst a non-consumer can decide the exact level of information requirements he/she wants. For the same reason, information requirements are only applied to mass contracts. Information requirements are not applied to contracts that are concluded exclusively by exchange of e-mails or by equivalent individual

39. See Distance Selling Directive, *supra* note 5, art. 4.

40. These information requirements are highlighted in other international texts. See Convention on the Use of Electronic Communication in International Commerce, G.A. Res. 60/21, art. 14, U.N. Doc A/RES/60/21 (Dec. 9, 2005); UNIFORM ELECTRONIC TRANSACTIONS ACT art. 10 (UETA) (1999) (approved by the National Conference of Commissioners on Uniform State Laws).

communications (e.g. chats or videoconferences), as there is no imbalance between service provider and the contractor in such cases.⁴¹

In conclusion, we are starting to protect not only the consumer, who is a non-expert and therefore a weaker party (the consumer is an institutionally weaker party), but also the professional non-expert. Such protection is necessary because the contract is agreed by means of electronic communication which makes all contractors weaker parties. In this case, consumers have a double level of protection as a kind of “super weaker party.”

IV. NEW CONTRACTING PRACTICES: ONLINE “AUCTIONS” AND THE CONSUMER CONCEPT

The extension of information requirements described above, which expands the concept of non-expert to include non-consumer, uses traditional consumer tools. As a result, the effect is rather limited. Another important change is expected in the near future, in relation to formal consumer to consumer (“C2C”) contracts agreed on a service provider’s website.⁴² This change is linked to online “auctions,” in which a website offers users the opportunity to buy and sell products using the technical infrastructure of the organizer in a wide range of legal processes.

In fact, even if we call these transactions “auctions” out of simplicity and because of the bidding process involved, it is difficult to compare online auctions with offline auctions. Not all the contract processes that occur on this kind of auction website involve bidding. In addition, there is no bidding at all when we contract the “buy-it-now” offer at a fixed price. Even when a bidding process does exist to fix the price, online auctions do not share most of the legal requisites of normal auctions, i.e., the service provider does not represent the seller, as occurs in offline auctions.⁴³ Therefore, as Riefa concludes, online auctions are

41. We are not referring to cases in which the service provider uses individual communication tools to avoid the legal obligations. In such cases, fraud can make the contract lose its validity.

42. On the rising importance of peer-to-peer platforms, see H. Schulte-Nolke, *EC Law on the Formation of Contract—From a Common Frame of Reference to the ‘Blue Button,’* 3 EUR. REV. OF CONT. L. 332 (2007).

43. For the main characteristics of online auctions, see CHRISTINA RAMBERG, *INTERNET MARKETPLACES: THE LAW OF AUCTIONS AND EXCHANGES ONLINE* 44 (Oxford Univ. Press 2002). In reference to Spanish law, see Gemme Rubio Gimeno, *La Protezione del Consumatore in un Contratto Atipico: Le Aste Online Nell’ordinamento Spagnolo*, in G. CAVAZZONI, L. DI NELLA, L. MEZZASSOMA & V. RIZZO, *IL DIRITTO DEI CONSUMI: REALTÀ E PROSPETTIVE* 667 (2007).

not traditional auctions.⁴⁴ Consequently, their legal interpretation must be based on the exact extent of the relations among the parties, stressing the fact that some of these parties may be consumers. To sum up, online auctions can involve a variety of contracting processes and do not always include bidding. They are analyzed here because they are new Internet practices that generate new ways of contracting. Consequently, online auctions can lead to new contracting problems.

This paper focuses on some aspects of online auctions. However, its scope does not include defining the entire legal treatment for this type of contract. I only address the implications of these platforms being offered by a service provider and the application of the legal framework to the previously-defined e-contract. Some problems related to consumer protection in this new technological environment will be discussed, including the three-sided relations that these practices create and the way they modify the stated concept of consumer. First, I clarify why the current, narrow concept of the consumer does not protect consumers from the new contracting types found on the Internet, which suggests that a major challenge will arise in the future.

There are at least three different relationships in online auctions because the seller and buyer use a third party system. This generates legal relationships among the seller, the buyer and the third party at different levels: there is a contract between the users (the buyer and seller), and a contract between each user and the service provider. This latter contract between each user and the service provider is the only relationship that is clear in the application of the E-commerce Directive. Moreover, the relation between the buyer and seller in an online auction can generate a B2C or a C2C contract.

In this contractual triangle, the third party is considered an Internet Service Provider ("ISP") and is subject to all the obligations stated in the E-commerce Directive. From this perspective, the third party is not only considered as a hosting service that allows parties to contact one another, but an active part of this relation and liable for the services they offer, like any other party on the Internet.⁴⁵ This idea arises from the fact that

44. See Christine Riefa, *To Be Or Not To Be An Auctioneer? Some Thoughts on the Legal Nature of Online "eBay" Auctions and the Protection of Consumers*, 31 J. CONSUMER POL'Y. 167, 169 (2008) (concluding that it would be odd to deserve this second type of contract). A different legal framework from auctions, or rather offline auctions, are excluded from the scope of application of the Distance Selling Directive. The problem is less significant in Spain, where online auctions are included in the national law that transposes this Directive, see Act 7/1996 de Ordenación del Comercio Minorista, art. 38(3)(b) (B.O.E. 1996, 15). However, other problems can easily arise: defining these practices as auctions does not avoid the problems highlighted in this text.

45. See Gimeno, *supra* note 43, at 674.

the third party carries out an economic activity on the Internet by putting the other parties in contact with each other.

This brings us to a crucial point of the analysis, as some of these services are free to the user. However, even in these cases, it is hard to deny that the third party's activity involves doing business. In most online auctions, the buyers must pay the price fixed in a bidding process but the online system is free. Normally, the third party makes money by charging the seller a commission. In the case of file sharing systems, the service is usually free to users. However, some websites are starting to include some paying content on their platforms.⁴⁶ In these cases, the service provider does business through advertising related to the website or through the data industry.⁴⁷ Such websites make money by generating Internet traffic and selling publicity. In any of these circumstances, the new practices are related to economic activity, at least for the third party who leads the processes, even if the services are free for one or two of the users. We can also argue that free use does not make a significant difference in terms of the regulatory framework, as the E-commerce Directive applies to any service provided "normally with remuneration."⁴⁸ That is to say, even when there is no payment, these cases are within the scope of the application of the E-commerce Directive and related national laws. Therefore, ISP can be defined as offering both remunerated and free services and must therefore comply with all the information requirements of identification,⁴⁹ the legal duties in the case of electronic communication,⁵⁰ and information about the contract.⁵¹ Regardless of the form of operation, a service provider in an online auction is a trader. Consequently, users benefit from the extension of consumer protection offered by the E-commerce Directive: all users of this kind of platform are considered non-experts in the mass contract services offered by online auctions. In other words, the restricted concept of consumer does not apply.

The general framework that defines the organizer of the online auction as an ISP is solid. However, the definition of the other parties in this three-sided scheme, that is to say, the relation between the users of

46. See RAFAEL SANCHEZ ARISTI, *EL INTERCAMBIO DE OBRAS PROTEGIDAS A TRAVÉS DE PLATAFORMAS PEER-TO-PEER* 84 (2007).

47. See Delores Gramunt Fombuena, *Dati Personali e Comunicazione Ellectroniche*, in *IL CODICE DEL TRATTAMENTO DEI DATI PERSONALI 944* (Vincenzo Cuffaro, Roberto D'Orazio & Vincenzo Risciuto eds., 2006).

48. See E-commerce Directive, *supra* note 29, art. 2 (referring to Council Directive 98/34/CE, art. 1(2), 1998 O.J. (L 204) (EC), modified by Council Directive 98/48/CE, 1999 O.J. (L 217) (EC)).

49. See E-commerce Directive, *supra* note 29, art. 5.

50. See *id.* arts. 6, 7.

51. See *id.* arts. 10, 11.

this new Internet practice, is not so clear. In online auctions, one of the main problems in devising the legal framework is to realize who is acting as the user of the service. If buyer and seller can be considered consumers in the narrow legal sense of “acting for purposes outside of their trade,” the Internet contract is a C2C contract, which is outside the scope of application of the Distance Selling Directive and other consumer protection laws. However, the figures reveal that a lot of the sellers on these online auctions are not consumers but retailers or even big corporations that use the platform to sell their products or as intermediaries. In addition, the buyers may not be consumers, as there is no restriction in the bidding process and anyone can be a buyer in these auctions. It is easy to conclude that if the seller is a consumer, the sale is C2C and should be excluded from consumer law because such tools are useless in this context. Nevertheless, if the buyer is a consumer *stricto sensu*, consumer law is applicable. Therefore, the real framework that is applicable to a contract formed in such circumstances cannot be known until we determine whether the buyer is a legal consumer according to EU regulations. This is only possible at the end of the contracting process, as this is the moment when we determine whether the buyer is a consumer or not. Consequently, neither legal security nor material justice is attained because our legal framework focuses on the concept of buyer and seller, whereas in these cases the correct approach stresses the special character of the contracting method; i.e. the use of a third party platform and no power of decision over the contracting process and online contracts. Only the aspects related to the transfer of property or execution of the contract—payment and delivery—should be treated as a normal sales contract.

For this reason, and focusing again on the three-sided scheme, the main problem of such practices is that the distinction between “consumer” and “trader” is turned upside-down. Traditionally, the consumer was the party who acted for purposes outside his/her trade, business or profession. In some cases, the buyer or seller are not consumers in the strict sense, even if they are as unaware of the contracting process as they would be if they were “real” consumers who needed the same extra information. In addition, traditionally, the supplier was the party who acted in his/her commercial or professional capacity, but this cannot be the case if the technical infrastructure of the online auctions is financed with funding from advertising. Therefore, the rationale of consumer law based on a strict concept cannot solve many of the problems that have arisen and the perspective of the legal framework is too narrow.

Nevertheless, the EU is addressing these new forms of exchange. For example, the Future Challenges Paper 2009-2014⁵² focuses on these issues and requests different regulations for online consumer behavior, as it differs greatly from the usual offline practices. Do we need different regulations for consumers depending on the type of contract? Perhaps a more effective solution would be to develop a general understanding of e-commerce contractual practices in order to solve the problems that arise, rather than focusing on the current narrow consumer concept.

CONCLUSION

New technologies highlight the idea of the consumer as the weaker party due to the imbalance of bargaining power. In fact, the consumer concept and the legal framework it requires makes sense when we consider two key-factors: the contractor is a non-expert and acts in a mass contract environment. These are the rationales for consumer law. For this reason, laws related to new contract types on the Internet aim to extend consumer protection tools such as pre-contractual information requisites, as stated in the E-commerce Directive. But the real challenges are found in the field of brand new contract types, such as those used in online auctions, that both strengthen the feeling that the parties must be protected beyond the narrow concepts of supplier, buyer and seller and simultaneously, completely change the rationales of the consumer concept as interpreted by the EU in its regulations. Moreover, these practices demonstrate that new rationales are needed in the online context to obtain legal certainty and material justice for all the parties involved.

52. Directorate-General for Health & Consumer Protection, *Future Challenges Paper: 2009-2014*, available at http://ec.europa.eu/dgs/health_consumer/future_challenges/future_challenges_paper.pdf.