



# **Governance of e-commerce and cyberspace**

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# Overview

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- E-commerce & global governance
- e-person, e-action and e-signature
- Multilevel governance
  - WikiLeaks case
- Applicable law in e-commerce
- Overview on international and European e-commerce rules
- Liability of providers
- Conclusions

# E-Commerce

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- Business on the internet
  - Worldwide B2B or B2C consumer relationships, e.g. Amazon
- Global communication infrastructure
  - Internet
  - Marketing, negotiations, agreement, on-line delivery
- Physical delivery network
  - Goods: Post, DHL etc.
  - Services: online or service provider
- US: 2010 - \$173 billion e-commerce and online retailing
- Virtual market places, e.g. eBay
- Legal problems: conflict of laws, consumer protection, rules for economic operators etc.

# Governance of cyberspace

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- An area governed by law (not a non-regulated area)
  - Compliance regimes with hard & soft rules
  - Multilevel governance
- UN Commission on Global Governance, Our Global Neighbourhood
  - The Report of the Commission on Global Governance (1995) chapter 1
- „Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.“
- Aim: rule of law as a efficient way of risk reduction by providing legal security

# Definitions of cyberspace (1)

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- Gibson (1991): metaphor for a new space in which through communication and data transfer certain actions are set
- New space for human activities where distance does not matter, e.g. communications, leisure (games, pornography), trading (e-commerce), participation (e-democracy), administration (e-government), working (?)
  - US Supreme Court, *United States et al v American Civil Liberties Union et al* (1997)
    - “[...] a unique and wholly new medium of worldwide communication. [...] Taken together, these tools [email, mailing list servers, newsgroups, chat rooms, World Wide Web] constitute a unique new medium - known to its users as "cyberspace" - located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”
  - Council of Europe, *Cybercrime Convention* (2001)
    - “[...] By connecting to communication and information services users create a kind of COMMON SPACE, called "cyber-space", which is used for legitimate purposes but may also be the subject of misuse [...]”.

## Definitions of cyberspace (2)

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- Invisible, intangible, non-territorial (but: IPv6 geographic-based unicast addresses), worldwide space (Grewlich 1999)
- Strong interaction with real world (people still live in real space; are always subject to enforcement of state of residence), but territorial approach is not sufficient any more
- No new territory (e.g. declaration of Barlow, cyberspace jurisdiction à la Johnson/Post)
  - Too strong interaction with real world
  - Persons may be very often in this space for some time, but they still live in a real physical world.
  - They are not away (concept: conflict of laws) and have no relation any more with a particular country!
- Multilevel governance but States remain the most important regulators; “sufficient links” to a jurisdiction required

# e-person (1)

- Same person as in real life but without the real life context and acting in an artificial ICT world called cyberspace (e.g. very limited wits level, in input as well as in output)
- Problem: identity link, “biometric touch”



*"On the Internet, nobody knows you're a dog."*

Cartoon by Peter Steiner (1993). Reproduced from page 61 of July 5, 1993 issue of The New Yorker, (Vol.69 (LXIX) no. 20.

## e-person (2)

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- Low level of requirements for internet activities
  - Prima facie: reasonable use of ICT environment + human communication
- Human person has a physical identity
  - Can be easily checked; together with legal identity (identity card, passport) sufficient proof for doing business
- Electronic identity: register + personal link
  - Data entry in a trustable register
    - E-mail
    - Telephone number, Skype identity, E.NUM
    - IP number
    - Domain name

# e-person (3)

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- Credit card number
- Bancomat/ATM/Maestro
- E-signature
- Citizen card
- Source identification number (Zentralmelderegister-Nummer, Stammzahl), bPk
- Some link with a „biometric touch“
  - Private and/or secret information
    - Personal data: CV, life context
    - Details of personal documents (e.g. date and place of birth, residence, numbers)
    - User identity/password
    - PIN/TAN codes

# e-person (4)

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- Electronic signatures
  - Secure electronic signatures
- Possession
  - Cards, chips, mobile phone, dongles, etc.
- In discussion/projects:
  - Finger prints
  - RFID chip
  - IRIS scan
  - Genetic data
- Electronic expressions of will of person (that's legally relevant)
  - Fulfilling certain access requirements to the proper interface (e.g. user identity/password, special cards, place of PC) + providing additional secret information + ICT activity (e.g. mouse click)
  - Full substitute for paper signature if certain requirements are met

# e-person (5)

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- Risk analysis required in order to achieve a balance between costs (more security) and benefits (higher dissemination)
  - Main risk: „personality theft“
- Law: In general, no particular form is required (but important for proof purposes).
- IT security: e-signature, personal identification
  - Very high standard, formerly only used at offices and notaries
- New balance required
  - People do not like e-signatures
  - User ID/password dominant
  - Mobile TAN
  - Mobile e-signature the solution ?

# e-action (1)

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- **Worldwide communication in real time**
  - Exchange of information, documents, negotiations, contracts, service delivery
  - Delivery of information services
- **Electronic transactions**
  - Telecommunication (voice telephone, data communication, internet access etc.) substitutes communication onsite
  - Electronic documents
    - Electronic signatures
  - Business in the knowledge society
    - Negotiations, contracts
    - Information: databases, digital libraries, digital bookstores
    - Software distribution

# e-action (2)

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- Consulting: software, professional services (law, medicine, etc.)
  - Entertainment: pictures, videos, television, games, books (?)
- Government in the knowledge society
  - Applications and authorisations on-line
  - Courts on-line
  - Online voting
- Civil society in the knowledge society
  - Association, participation, entertainment, civil life, jobs
- e-documents
  - *Document: (lat) documentum* = proving certificate
  - Authenticity & identity
  - e-signatures
    - „simple“, advanced, qualified, „quasi“

# Regulation of cyberspace (1)

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- Multilevel regulation
  - 3 layers (Schweighofer, Murray, Benkler)
    - Physical infrastructure layer: link layer (Internet Protocol suite)
      - Territorial sovereignty, ITU (International Telecommunications Union)
      - Regulative restraint of States
    - Logical infrastructure layer: transport layer (Internet Protocol suite)
      - ICANN & IETF (Internet Engineering Task Force)
      - Network neutrality principle but the “Great Firewall” of China
    - Content layer: application layer (Internet Protocol suite)
      - Application of many territorial jurisdictions but also of new governance regimes
      - Some competition between regulation providers
  - Many regulators (Slaughter, Engel, Schweighofer)
    - Replacement of strict hierarchies (governance by government) by a some competition of different regulative systems (governance with government)

# Regulation of cyberspace (2)

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- Governance by recognition, limited enforcement by territorial state and cyberspace
  - Johnson/Crawford/Palfrey Jr. (2004): “The Peer Production of Governance”
- Exit option of citizens, companies and communities
- Transnational order (Jessups) with new forms of regulation
  - Legal systems, regimes, networks, self-regulation
- Types of regulation
  - Territorial (states)
  - Topical (international organisations, transnational corporations, civil society)
  - Technological (code = law [Lessig])

# Regulation of cyberspace (3)

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- Some co-operation between regulators required
  - In general, system works quite well
  - However, sometimes a chaos results from different regulation aims
    - Data protection, pornography, lotteries, spam, Nazi propaganda, freedom of speech vs. secrecy of States or businesses
- New challenge for risk reduction (e.g. providing legal security) as main aim of legal systems due to exit options
  - Leading principles
    - B2B: Business enjoys free choice but should take risks arising from different jurisdictions
    - B2C: Consumers have the privilege that applicable law and jurisdiction are those of their country of residence

# Cyberspace regulators (1)

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## ■ States

- Main regulators; make laws, provide adjudication and enforcement.
  - Territoriality/non-intervention
    - Activity, effect, seat of business, place of residence, birth
  - Personality
  - Extraterritorial (unilateral) regulation
    - Effect
    - e.g. USA, EU
  - Regulative restraint on internet issues (Grewlich 1999)
    - Stronger role for self-regulation
    - Forever?

# Cyberspace regulators (2)

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- New principle of targeting
  - Definition: e.g. EU Regulation 44/2001 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters
- Broad principles, fine-tuned rules in national legal orders (international private, administrative and penal law); extraordinary strong role for these often neglected areas of law
- Conflict of laws
  - Applicable law
    - Public law: national law
    - Private law: Rome Convention on the law applicable to contractual obligations, UN Convention on the Sale of Goods, national law

# Cyberspace regulators (3)

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- parties are free to choose
- No clause: State to which the contract has the closest connection
- Presumption: State of the party performing the characteristic obligation
- Consumer contracts: law of the consumer must be applied if either:
  - Conclusion of contract because of a specific invitation to the consumer or by advertising in the consumer's member State
  - Seller received the consumer's order in the consumer's member State
    - WWW-indicators: domain name, language, content of website, activities of business so far, marketing
- Jurisdiction
  - Public law: national law
  - Private law: Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters; since 1 March 2002 replaced by Council Regulation 44/2001

# Cyberspace regulators (4)

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- B2B
  - Jurisdiction: chosen by parties
  - in absence of agreement: courts of the defendant's domicile
- B2C
  - Consumer can sue in the State where the business is established or in the State of his own domicile
  - Merchant can only sue in the consumer's home State
- Definition of consumer contract
  - Contracts with a consumer for:
    - a repayable in instalments or;
    - the sale of goods on instalment credit terms or;
    - contracts where a specific invitation or advertising was made in the consumer's state of domicile and the consumer took the steps to conclude the contract in his State of domicile

# Cyberspace regulators (5)

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- International Governmental Organisation (IGO) [community of states] and International Non-Governmental Organisation (NGO) [community of citizens (economic or non-economic)]
  - International co-operation of states but also NGOs, transnational corporations (e.g. in ITU) and citizens (e.g. ICANN)
    - Legal basis: international treaty or private contract
    - Co-operation: OCED, Council of Europe, UNO and special agencies, ITU, UNCITRAL
    - Regulation: ITU, WIPO, WTO, OCED, Council of Europe, Hague Conference on Private International Law, UNCITRAL, IETF, ICANN

# Cyberspace regulators (6)

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- Supranational regulation: EU/EEA (telecommunications, internet, data protection, intellectual property law, e-commerce law etc.)
- Dispute settlement: ICANN domain names, credit card charge-backs, on-line dispute settlement
- Enforcement: ICANN domain names, credit card charge-backs

# Cyberspace & WikiLeaks (1)

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- Not-for-profit media organisation; launched 2007, no official registration; speaker: Julian Assange
- Physical layer
  - Central server is hosted by PRQ, a Sweden-based company
    - No questions, no records (e.g. BitTorrent website, The Pirate Bay)
  - Servers are spread around the world
    - Pressure of States to close down servers
  - WikiLeaks: profiting from open physical communication network; problem of physical seizure of server is solved by placing it in jurisdictions with no control of media companies

# Cyberspace & WikiLeaks (2)

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- Logical layer
  - IP addresses
    - ISP
  - Domain name: wikileaks.org
    - Registry: Public Interest Registry
    - Registrar: EveryDNS
    - Holder: John Shipton c/o Dynadot Privacy, San Mateo, CA
      - 2.10.2010: closed due to denial of service attacks
    - New registry: SWITCH
    - New registrar: Piratenpartei Schweiz
    - New holder: Piratenpartei Schweiz, Simonet Denis, Ipsach
  - Many cover domains

# Cyberspace & WikiLeaks (3)

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- WikiLeaks: profiting from principle of network neutrality but subject to content blocking (e.g. China – Golden Shield Project)
- Content layer
  - Jurisdiction crucial for activity; blocking of content by other jurisdictions possible
  - WikiLeaks
    - Media company, editorial policy, verification of submissions
    - Total protection of sources (encryption)
  - Swedish law: information providers (media companies) get total legal protection
  - Move to Island or Switzerland considered
    - Icelandic Modern Media Initiative

# Cyberspace & WikiLeaks (4)

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- People, in particular Assange
  - May have violated laws in many countries (state secrets, data protection etc.)
  - Jurisdiction due to effect on particular territory (targeting)
  - Risk of trials
    - Protection: media laws, whistleblower rules

# Legal acts in cyberspace (1)

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- Conclusion of legal transactions, notice of documents, electronic decisions etc. with electronic signatures or equivalent procedures
- In general, laws are quite open to electronic wills, in particular in private law.
- In recent years, obstacles to electronic acts have been removed.
- Private law
  - Electronic wills
    - Computers, software agents or robots may be used for declarations of wills; it has to be covered by a general will of declaration and action of the responsible person.

## Legal acts in cyberspace (2)

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- Freedom of choice (§ 883 ABGB – General Civil Law Code)
  - Electronic wills are allowed and accepted.
    - Technical means for correction of input errors (§ 10 e-commerce act, Art 11 EC directive)
- Remittance of electronic wills
  - ... Sphere of influence of addressee
    - § 12 EC act, Art 11 para. 1 second indent of EC directive
- Remittance of electronic wills by service providers
  - Immediate confirmation of access by service providers (§ 10 EC law, Art 11 EC directive)

# Legal acts in cyberspace (3)

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- No obligation for immediate acceptance in case of offer between absentees, user is normally offerer, e.g. he is bound to his offer by usual period of consideration
- In case of chats could be assumed an offer through persons present, e.g. immediate acceptance is required.
- Public law
  - More formalised
    - § 1 para. 2 signature law: applies also for electronic communications with courts and other authorities
    - E-government law: contains further provisions (identity, public documents)
  - Electronic submissions
    - Considered as written notifications in case of use of citizen card (Bürgerkarte) (identification) with electronic signature (authentication)

# Legal acts in cyberspace (4)

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## □ Electronic files

- Electronic decisions, minutes (§ 18 law on general procedures, e-government law)
- E-signature or other suitable procedures

## □ Electronic notices

- Registration for list of electronic addresses for service of documents
- Documents uploaded by public service with official signature in an encrypted form on the server of the electronic delivery service
- Access and downloading only with citizen card
- Information on delivery by e-mail

# Applicable law in e-commerce (1)

- UN Convention on the Sale of Goods (BGBl 96/1988): only applicable for goods
- International private law
  - Austria: conflict of laws act (IPR-Gesetz)
  - EU
    - Rome Convention [Römer Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht (EVÜ)]
    - Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6
    - Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40
  - Parties are free to choose
  - In absence: State to which the contract has the closest connection
    - Presumption: State of the party performing the characteristic obligation

# Applicable law in e-commerce (2)

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- Consumer contracts: law of the consumer must be applied if either:
  - Conclusion of contract because of a specific invitation to the consumer or by advertising in the consumer's member State
  - Seller received the consumer's order in the consumer's member State
    - WWW-indicators: domain name, language, content of website, activities of business so far, marketing
- Trend to harmonise Consumer Protection Law on European level
  - Distance Selling Directive
  - Consumer's Interests Directive
  - Directive on Distance Marketing of Consumer Financial Services
- E-commerce providers
  - Subject to national law

# Applicable law in e-commerce (3)

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- Within the EU: subject to laws of the place where an operator actually pursues an economic activity
- Internal Market principle of mutual recognition of national laws and the principle of control in the country of origin will be applied to Information Society services subject to protection of the public interest

# Targeting & e-commerce websites

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- Opinion of General Advocate TRSTENJAK in cases C-585/08 Pammer and C-144/09 Hotel Alpenhof (no English version available):
  - Für das „Ausrichten“ der Tätigkeit im Sinne von Art. 15 Abs. 1 Buchst. c der Verordnung Nr. 44/2001 reicht es nicht aus, dass die Website des Vertragspartners, der eine berufliche oder gewerbliche Tätigkeit ausübt, im Wohnsitzmitgliedstaat des Verbrauchers im Internet abrufbar ist. Das nationale Gericht hat unter Berücksichtigung aller Umstände des Falles zu beurteilen, ob der Vertragspartner, der eine berufliche oder gewerbliche Tätigkeit ausübt, seine Tätigkeit auf den Wohnsitzmitgliedstaat des Verbrauchers ausrichtet. Wichtige Beurteilungsfaktoren sind insbesondere der Inhalt der Website, die bisherige Geschäftstätigkeit des Vertragspartners, der eine berufliche oder gewerbliche Tätigkeit ausübt, die Art der verwendeten Internetdomain und die Nutzung der Möglichkeiten, über das Internet oder auf sonstige Weise zu werben.
  - Targeting of activities to the State of residence of consumer
    - Website retrievable in State of residence of consumer not relevant
    - Content of website, activities of business so far, type of internet domain and use of possibilities of marketing on the internet

# Extra-judiciary dispute settlement

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- Online (Online Dispute Resolution – ODR) or offline
- Freedom of choice of means of dispute settlement in public international law
- Business
  - Recognition of arbitration awards according to the New York Convention 1958
  - Hague Convention of 30 June 2005 on Choice of Court Agreements
  - Encouragement of extra-judicial dispute settlement by Art. 17 E-Commerce-Directive
- New initiative by UNCITRAL for online dispute resolution

# WTO

- WTO (World Trade Organisation, Geneva)
  - <http://www.wto.int>
  - Effective protection of content
  - Protection against prohibitive customs and taxes
- TRIPS: protects content of the internet
  - Effective through WTO dispute settlement procedure (DSU)
- Declaration on Global Electronic Commerce, Ministerial Conference, 20.5.1998
  - Comprehensive working programme for global e-commerce
  - Standstill: no new customs on e-transactions
- Customs (tariffs, free trade for small transactions)
- Taxes (non-discriminatory application of taxes on value-added and consumption)
- WTO Agreement on Basic Telecommunications Services, 15.2.1997

# Other International Organisations

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- OECD (Organisation for Economic Co-operation and Development)
  - „Think tank“ of industrialised states
  - Broad guidelines for e-commerce
    - Global Information Infrastructure, data protection, encryption, consumer protection („charge backs“)
- UNCITRAL (United Nations Commission for International Trade Law)
  - *Lex mercatoria* for internet trade
  - 2005 - United Nations Convention on the Use of Electronic Communications in International Contracts
  - 2001 - UNCITRAL Model Law on Electronic Signatures
  - 1996 - UNCITRAL Model Law on Electronic Commerce
  - 1985 - Recommendation on the Legal Value of Computer Records
  - In negotiation: online dispute resolution
- EU: competence of internal market and telecommunications, action programmes (e.g. secure use of the internet), eEurope, ccTLD .eu

# Legal framework for electronic commerce (1)

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- Directive 2000/31/EC on electronic commerce, OJ L 178/2000, 1-16
- COM (98) 586, amended: COM (1999) 427
- Common Position: February 2000
- Austria: E-Commerce-Act (Federal Gazette (BGBl.) I 152/2001)
- Information society services
  - Directive 98/48, OJ L 217/1998, 18, art 1
  - Information Society services, both business to business and business to consumer, and services provided free of charge to the recipient - e.g. funded by advertising or sponsorship revenue and services allowing for on-line electronic transactions such as interactive tele-shopping of goods and services and on-line shopping malls
- Service providers established within the EU
  - Place where an operator actually pursues an economic activity through a fixed establishment, irrespective of where web-sites or servers are situated or where the operator may have a mail box

# Legal framework for electronic commerce (2)

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- Commercial communication
  - any form of communication designed to promote, directly or indirectly, the goods, service or image of a company
- Internal Market principle of mutual recognition of national laws and the principle of control in the country of origin will be applied to Information Society services
  - Restrictions on Information Society services supplied from another Member State
  - Protect the public interest on grounds of protection of minors, the fight against hatred on grounds of race, sex, religion or nationality, including offences to human dignity concerning individual persons, public health or security and consumer protection including the protection of investors
  - Proportionality
  - Procedure rules

# Legal framework for electronic commerce (3)

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- No prohibitions and restrictions for on-line contracts
  - *Conclusion is regulated by national law.*
- Information requirements for the conclusion of electronic contracts
- Liability of intermediaries
  - Limitation of liability for passive role: "mere conduit" of information, storage of information
- Commercial communications (such as advertising and direct marketing)
  - Commercial communications by e-mail should be clearly identifiable; right of objection (Robinson list)

# Legal framework for electronic commerce (4)

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- Regulated professions (such as lawyers or accountants)
  - Homepages + on-line services are allowed but respect of professional ethics.
- Implementation
  - Codes of conduct at EU level
  - Stimulating administrative co-operation between Member States
  - Facilitating the setting up of effective, alternative cross-border on-line dispute settlement systems

# Liability of providers (1)

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- Pornography, NS propaganda, defamation, libel, copyright violation etc.
- Penal law, liability law etc.
  - Kind of criminal act
  - Contribution of provider - secondary liability, or indirect infringement
- Basic rule: provider has to take reasonable measures to prevent the storage and distribution of such contents
- Emerging rule: providers have to support public authorities in law enforcement
  - Security Police Act, Copyright Act, Data Retention Directive etc.
  - Compensation required: VfGH 27.02.2003 G37/02 et al.; V42/02 et al.

## Liability of providers (2)

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- Access provider: no liability for pure transit of data (Art. 12 E-Commerce Directive 2000)
  - Content blocking (child pornography, China: Great Firewall)
  - User blocking (HADOPI law)
  - Information obligations
    - S. 53 Security Police Act: obligation to disclose IP addresses, IMSI and location data provided, *inter alia*, in case of a necessity of defence against a dangerous attack or the duty to assistance
    - S. 87b para. 3 Copyright Act: obligation to disclose the identity of those clients if sufficient reasons exist that their internet access may have been used for copyright violations
      - LSG Tele2 EJC 19 February 2009, C-557/07, Austrian Supreme Court, 14 July 2009, 4Ob41/09x: no disclosure of traffic data stored without authorisation

# Liability of providers (3)

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- Data Retention Directive 2006/24/EC
  - Storage of telecommunications data for six to 24 months and deliver on request details on such communications (partners, time, location)
- Caching (Art 13 E-Commerce Directive 2000): no liability if fast removal or closing in case of public interdiction
- Hosting (Art 14 E-Commerce Directive 2000): no liability in case of prompt removal or closing in case of knowledge on prohibited contents

# Electronic money & payments (1)

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- Recommendation of the Commission 97/489
- Directive 2000/46/EG on e-cash institutions, OJ L 275/2000, 39
- Regulation 2560/2001 on cross-border payments in euro, OJ L 344/2001, 13
- Directive 2007/64/EC on payment services in the internal market, OJ L 319/2007, 1
  - Austrian transposition: Zahlungsdienstegesetz – ZaDiG (BGBl.I 52/2009)
- Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267/2009, 7

# Electronic money & payments (2)

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- Definition: monetary value on data media, means of payment, small amounts (max. 250 Euro)
- Issue only by banks or electronic money institutions
- No Austrian transposition so far

# Consumer protection & distance selling

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- Directive 97/7/EC on the protection of consumers in respect of distance contracts, OJ L 144/1997, 19
  - Goods and services
  - Consumer protection: written confirmation, right of revocation
  - Austrian transposition: Fernabsatz-Gesetz, BGBl. I 185/1999
- Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ 271/2002, 16
  - Austrian transposition: Fern-Finanzdienstleistungs-Gesetz, BGBl. I 62/2004

# Conclusions

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- Choice of jurisdiction & applicable law very important for doing business on the internet
- E-commerce provider: must comply with legal rules in host country
- +
- Rules for doing business
  - Free choice; with consumers: a business has to be targeted to a particular jurisdiction
  - Disagreement between jurisdictions offers changes and risks; international co-operation decisive for elimination of “bad behaviour”

**Thanks for your attention!**



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