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Producers and Consumers in EU E-Commerce Law

John Dickie (Oxford: Hart, 2005)

Banu Sit†

Rapid growth of technology in the last decades has given rise to electronic commerce (e-commerce) as a new mode of commerce. This new commerce environment has many characteristics that affect commercial relationships and parties. Of these characteristics, global and borderless commercial activity and the intangible nature of communication can be singled out.

From a legal perspective, e-commerce has developed new modes, of contract formation, performance of contracts for intangible goods, as well as payment. In this new borderless and transient sphere, certain interests of parties involved in commercial activities as buyers or sellers are in need of protection. In particular, consumer protection in e-commerce has attracted much attention in this context. Indeed, certain aspects of e-commerce need to be evaluated with respect to consumer interests in the framework of fair trade, privacy, secure payment mechanisms, morality, and so forth.

While in some legal regimes the issue is handled under general consumer protection law, others prefer to adopt new regulations addressing e-commerce and consumer protection in cyberspace. The European Union (EU) is one of the legal regimes that directly regulates aspects of e-commerce. However, it is not clear whether those legal instruments grant enough protection for consumers on all levels of commercial relationships, such as the requirements relating to the pre-contracting, contract formation, performance, or dispute resolution stages. In other words, consumer protection with respect to fair trade, privacy, and payment security is under focus in this context.

In *Producers and Consumers in EU E-Commerce Law*, John Dickie examines this issue and argues that, as compared with producer protection, the EU fails to protect consumers adequately. In the first Chapter of the book, after evaluating the distinctive nature of e-commerce,

Dickie compares consumer and producer interests. He identifies the interests of both parties, giving priority to fair trading, privacy, and morality with respect to consumers, and authorship and domain-identity with respect to producers. At the end of this introductory chapter, the role of the EU as a regulatory authority is examined, according to single market requirements affecting e-commerce legislative efforts and the subsidiarity principle designating the EU's jurisdiction over global issues of e-commerce.

Chapters 2 to 4 explain consumer interests and explore the deficiencies of the EU regulation in this regard. In Chapters 5 and 6, Dickie seeks to prove his basic argument by examining producer protection and contrasting it with consumer protection in e-commerce. First of all, in Chapter 2, he handles the interests of consumers in fair trade and EU regulation related to this issue. According to Dickie, the EU's actions can be divided into three categories: support for self-help, substantive protection, and cross-border co-ordination. The relevant EU regulations and their related provisions for each of these areas are the Directives on e-commerce¹ and on distance contracts.² In Dickie's opinion, each of these Directives has provisions to support self-help solutions, such as activities carried out by consumer organizations. However, regarding substantive protection for consumers, it is difficult to reach the same conclusion, as these Directives have some serious flaws. Although the extent to which electronic contracts fall within the scope of the Directive on distance contracts is not clear in this part, Dickie criticizes the restrictive definition of "distance contract" in terms of having a limited scope with respect to consumer contracts. In addition, since financial services are excluded from its scope, this approach is also criticized in the same context. The Directive on e-commerce is also dealt with in terms of substantive protection. Dickie argues that the principle of home country

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control in this Directive favours the interests of sellers, who have to comply with only one Member State's marketing laws. As well, the Directive does not address consumers' interests of fairness in relation to marketing practices. Dickie also criticizes the Directive on distance contracts for its deficiency in designating specified sanctions for cases where the seller does not provide the required information to the consumer, as required by the Directive. In the same context, although the necessity (arising from the nature of the Internet) of providing information in a durable form for contracts over the Internet has been observed, it is not clear what "durable medium" means. When it comes to the cross-border protection of consumers, although there are some general international or EU regulations applicable to consumer protection, they are deemed insufficient for substantive consumer protection. Dickie examines these legal instruments at a very detailed level of analysis, and displays the failure of these regulations to protect consumer interests, especially in terms of contracts over the Internet.

Chapter 3 deals with consumers' privacy interests, and the same method of analysis is followed in this chapter. After describing the privacy interests of consumers, self-help processes, and EU regulations, Dickie states that in respect of privacy protection, the EU chose to develop a public law framework rather than self-help processes. The main regulations in this field are the *Privacy Directive*³ and the *Directive on Privacy and Electronic Communications*.⁴ Dickie criticizes these regulations for their deficiencies regarding consumer privacy protection. These Directives do not set up a requirement for consumer consent to the collection of data, and there is no remedial framework. In regards to co-ordination, the regulations do not provide sufficient protection in terms of trans-border data flow, especially when compared with US regulations. Dickie analyzes privacy protection for consumers in international e-commerce by comparing it with US legislation and enriches his argument with a discussion of related cases.

The moral interests of consumers are dealt with in Chapter 4. These interests are described in the general framework as the need to protect children from sexual and violent online material. In Dickie's opinion, though self-help is important, it has only a limited role to play in protecting moral interests. EU action can be characterized as supporting self-help, since there are no measures that provide substantive protection for consumers' morality interests in e-commerce. Dickie analyzes some US cases and an Australian act containing related provisions and argues for solutions in this comparative framework. In addition, although they are not directly related instruments, relevant provisions of the Directives on e-commerce and distance contracts are mentioned in this part. Dickie criticizes the EU's lack of action in protecting moral interests with substantive law, and states that although content control is a sensitive issue and the EU is expected to act slowly in this area, action is still

speedier when it comes to protecting producers' interests under the same considerations.

In Chapter 5, Dickie begins to examine producers' authorship interests; domain-identity interests are considered in Chapter 6. In terms of authorship interests, the EU has taken an active role in protecting producers' interests and has adopted four instruments: the *Information Society Directive*,⁵ the *Conditional Access Services Directive*,⁶ the *Database Directive*,⁷ and the *Enforcement Directive*.⁸ Dickie discusses these Directives, in detail, one by one. He finds that the EU provides a very broad protection to producers in the field of authorship interests. Global protection is given special importance in these legal instruments, while within this same framework of EU regulations, consumer interests are ignored. In Chapter 6, Dickie follows this same method of analysis for the domain-identity interests of producers. After describing producers' domain-identity interests in terms of self-help solutions, he evaluates the role of ICANN (Internet Corporation for Assigned Names and Numbers) in a very detailed manner. He then proceeds to consider EU action in regard to supporting self-help solutions and regulating the field. In this part, the EU's active role in the development of self-help processes is explained. As regards substantive protection, the *Trade Mark Directive*⁹ and *Trade Mark Regulation*¹⁰ are examined. Together these regulations provide a close protection for producers' domain-identity interests. The *Trade Mark Regulation* can be seen as the main instrument in this field, since it is mandatory in all Member States, as well as directly applicable.

Finally, in the "Conclusion", Dickie compares all the data that he provided in previous chapters and seeks to establish that there is an imbalance between the protection of consumers' and producers' interests in e-commerce. To do this, he extracts the main points from consumers' interests and from producers' interests, separately. This way, prospective aspects and gaps of consumers' and producers' interests are formulated in a very clear manner. As a general overview, it can be said that although there are gaps in the consumer protection legislation of the EU, such as a restricted meaning of "consumer" in the directives on e-commerce and on distance contracts, a lack of clarity in the directives on privacy, a failure to provide a general enforcement framework for impingements on consumers' privacy, and a failure to take an action on realizing a substantive protection system for consumers' morality interests, there are no major gaps in the field of producers' interests. This comparative part is followed by a "Summary" that evaluates this imbalance and its effects on consumers, especially at the EU level, rather than at the national level. Dickie maintains that working for market integration is one of the main reasons for this imbalance: the EU gives priority to the free movement of goods and services over consumer protection. After the EU's failure to protect consumer interests in e-commerce is diagnosed, Dickie's "Research Findings" are laid out. He explains the EU's

role in a global context, and the book concludes by placing the EU's activities in the framework of international legislative efforts.

Producers and Consumers in EU E-Commerce Law is a comprehensive book, based on a PhD thesis written at the University of Warwick. The book, in its seven chapters, seeks to prove its basic argument that the EU has failed to protect consumers' interests in e-commerce. Dickie succeeds in this aim by giving detailed explanations of the deficiencies of the EU's consumer protection measures. The book contains useful data on the EU's consumer protection activities. The reader who is

looking for a consideration of producers' interests in e-commerce will also be somewhat satisfied, although producers' interests could be taken in hand in a wider perspective. In this regard, the book's title, *Producers and Consumers in EU E-Commerce Law*, does not entirely reflect its main character. A name reflecting the book's emphasis on consumer protection and its comparative structure would be more suitable. However, taken overall, the book demonstrates a critical approach to the EU's actions in the field of consumer protection in e-commerce and develops an alternative approach.

Notes:

¹ EC, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, [2000] O.J. L. 178/1.

² EC, *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of consumers in respect of distance contracts*, [1997] O.J. L. 144/19.

³ EC, *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, [1995] O.J. L. 281/31.

⁴ EC, *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector*, [2002] O.J. L. 201/37.

⁵ EC, *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] O.J. L. 167/10.

⁶ EC, *Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access*, [1998] O.J. L. 320/54.

⁷ EC, *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*, [1996] O.J. L. 77/20.

⁸ EC, *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights*, [2004] O.J. L. 157/45 as corrected by [2004] O.J. L. 195/16.

⁹ EC, *First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks*, [1989] O.J. L. 40/1.

¹⁰ EC, *Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark*, [1994] O.J. L. 11/1.