

GETTING THE DEAL THROUGH

e-Commerce

in 31 jurisdictions worldwide

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General

- 1** How can the government's attitude and approach to internet issues best be described?

The Bulgarian government's attitude and approach to internet-related issues has substantially developed over the past few years. Considering that Bulgaria was to become a member state of the European Union (EU) as of 1 January 2007, prior to this a certain number of new legislative acts had been adopted (among which was the Electronic Commerce Act – for details see question 2) to bring Bulgarian legislation into line with the EU requirements. However, electronic commerce is still in the early stages of development and a number of obstacles, both legislative and factual, still exist with regard to internet transactions.

Legislation

- 2** What legislation governs business on the internet?

The act that specifically regulates e-commerce is the Electronic Commerce Act (ECA). The ECA was adopted in June 2006 to implement 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 (Directive on Electronic Commerce), and entered into force as of 24 December 2006. Further, the Commercial Act, the Obligations and Contracts Act, the Electronic Document and Electronic Signatures Act, the Consumers Protection Act and the Electronic Communications Act are also applicable to matters concerning business on the internet. Other related acts are the Personal Data Protection Act, the Provision of Distance Financial Services Act, the Copyright and Related Rights Act, the Penal Code, tax laws, etc.

Regulatory bodies

- 3** Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

Different state authorities are competent in different fields related to e-commerce. Currently control over compliance with the provisions of the ECA is the responsibility of the Consumer Protection Commission (CPC). Certain powers with regard to interaction and cooperation with the relevant EU authorities are vested in the chairman of the State Agency for Information Technologies and Communications. The national authority competent in matters related to the provision of electronic communications is the Communications Regulation Commission (CRC) and providers of electronic communications networks or services (including internet access providers) should inform the CRC of their tariffs at the latest three days before their entry into force. Where privacy issues are concerned, the Personal Data Protection Commission and its chairman have competence. Depending on

the relevant case, other authorities may also have certain powers (ie, the Commission for Protection of Competition, etc).

Jurisdiction

- 4** What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or contentions) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

The rules related to determination of jurisdiction are provided in the International Private Law Code (IPLC). No specific regulations related to internet-based transactions are provided for in the Bulgarian legislation and the general provisions of the IPLC shall apply. With regard to the applicable law, it shall be determined in compliance with the specific criteria provided in the ECA.

Contracting on the internet

- 5** Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Generally under Bulgarian law no problems arise with regard to the validity of contracts concluded electronically. Problems may appear in proving the contract was actually concluded or its actual content but will not affect its validity. However, in certain cases, to be valid, a contract has to be executed either in simple written form or in the form of a notarial deed (or with notarised signatures). Where the law requires a notary form (or notarised signatures), such contract cannot be concluded via internet. Where simple written form is required, the parties to the contract may conclude it electronically and the contract shall be considered valid. It should be noted, however, that if such contract is not signed with electronic signatures within the meaning of the Electronic Document and Electronic Signatures Act (EDES), if a dispute arises it could be difficult for the parties to prove who consented to the contract and what its exact content is.

With respect to 'click wrap' contracts, it should be considered that the general rules of the Bulgarian law of obligation require that the acceptance of the vendor's terms and conditions should be done in writing. Art. 293, paragraph 4 of the Commercial Act and article 3 of the EDES provide that the written form is considered observed when the statement is technically recorded in a way allowing its reproduction, or when an electronic statement is recorded on magnetic, optic or other medium allowing its reproduction. In order to produce its legal effect, the statement has to be received, and confirmed by the addressee via electronic means. Therefore, if a click wrap contract is concluded, it is necessary that the click with which the party accepts the terms and conditions is recorded and can later be reproduced, and a confirmation for receiving the statement is

made by the vendor without any unjustified delay. Under the ECA the vendor is also obliged to provide to the consumer the terms and conditions in a way allowing their retention and reproduction. There is also a requirement for provision of information about the legal meaning of each technical step of the process of concluding the contract, which is to ensure that the party's will was aimed precisely at the conclusion of the contract.

- 6** Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

Special provisions governing electronic statements, including electronic contracts, are contained in the EDESA. However, these relate mainly to different aspects of electronic signatures. With regard to business-to-consumer contracts concluded electronically, the provisions of the Consumers Protection Act (CPA), related to distance contracts shall apply. The CPA gives a certain level of protection to consumers by providing a list of requirements that have to be met where a distance contract is concluded. As the CPA generally implements 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 (the Distance Contracts Directive), it shall not be reviewed in detail here. Certain requirements are also provided in the ECA, which are in compliance with the provisions of the Directive on Electronic Commerce. The provision of distance financial services is subject to regulation by a special law – the Provision of Distance Financial Services Act.

As for business-to-business contracts, no special act exists and the general provisions of the Commercial Act and the Obligations and Contracts Act shall apply.

- 7** How does the law recognise or define digital or e-signatures?

In its article 13 the EDESA recognises three types of electronic signatures:

- basic electronic signatures;
- qualified electronic signatures; and
- universal electronic signatures.

A basic electronic signature is any information related to the electronic statement in any way and coordinated between the author and the addressee that is sufficiently secure with regard to the needs of civil and commercial relations, and that:

- reveals the identity of the author;
- reveals the consent of the author of the electronic statement; and
- protects the content of the electronic statement from future amendments.

A qualified electronic signature is a transformed electronic statement included, added or connected logically with the same electronic statement before the transformation.

A universal electronic signature is a qualified signature the certificate for which is issued by a certification authority, recorded in the register kept by the CRC.

Basic electronic signatures and qualified electronic signatures are given the same legal effect as handwritten signatures, except in cases where the titular (owner) or the addressee of the electronic statement is a state or municipal authority. In the latter case only a universal electronic signature is recognised as equivalent to a handwritten one.

- 8** Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

According to the EDESA, where the electronic statement is transmitted, received, copied or kept by an intermediary, such an intermediary must ensure the correct determination of the time and source of the transmitted electronic statement. Further, the intermediary must maintain secure systems for keeping this information, and retain it for two years. If the intermediary fails to perform any of these obligations, it shall be liable for damages incurred as a result of the non-performance. In addition, where an intermediary does not retain the information for the two-year term, the natural persons responsible may bear criminal liability in accordance with the Bulgarian Penal Code.

Security

- 9** What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

According to the Electronic Communications Act the ISPs are obliged to guarantee the confidentiality of communications by undertaking all the necessary technical and organisational measures.

Further, personal data protection requirements also have to be considered. In February 2007, on the basis of the Personal Data Protection Act, the Personal Data Protection Commission adopted Ordinance No. 1 on the minimum level of the technical and organisational measures and the permissible type of personal data protection, the provisions of which should be observed.

- 10** As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

No authority may require private keys to be made available.

The EDESA provides for two types of certification authorities – certification authorities that may issue universal electronic signature certificates and certification authorities that are entitled to issue only qualified electronic signature certificates. The difference between these two types of authorities is that the first are recorded in the register kept by the CRC. The activity and the obligations of both types of certification authorities are subject to regulation by the rules of the EDESA and the applicable civil and commercial legislation. Their responsibility for damages incurred by any third party as a result of a non-performance of their obligations is also provided for in the act, according to which any contractual clause for limitation of the liability of the certification authorities, including in cases where they act with negligence, is void.

Domain names

- 11** What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

The registration of '.bg' domains is performed by the national registry – a limited liability company named 'Register.BG' and in relation to the registration procedure its general rules are applicable. The procedure that should be followed consists basically of four steps – submission of domain name application; configuration of the domain; settlement of the due payments; and registration of the domain. For a successful registration the requirements specified by the General Rules should be met.

With regard to the possibility of registration of a country-specific domain name by a non-resident, generally no obstacles exist, as long as all the other requirements are satisfied. The only specific

requirement is that the registration process for persons from countries outside the EU should be conducted by a local representative or a representative from a member country of the EU.

- 12** Do domain names confer any additional rights (for instance in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

The domain names confer no additional rights. It should be noted that one of the requirements for the registration of a '.bg' domain is either to own an equal trademark or geographic name valid in Bulgaria, or to be in the process of registering such. Other possibilities for allowing registration of domain names are: the applicant is a company, consortium or partnership with an identical denomination, the applicant has a registered publication with identical name, etc.

- 13** Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Neither the Bulgarian legislation, nor the general terms of Register.BG provide for any procedure for repeal of a domain registration. However, where an identical domain name has been registered by a person other than the owner of the trademark, the latter is entitled to seek remedy for violation of intellectual property or competition protection rules.

Advertising

- 14** What rules govern advertising on the internet?

No specific rules related to advertising on the internet are provided for in Bulgaria and the general legal provisions shall apply.

- 15** Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

Yes, certain restrictions regarding advertising in general are provided in the Bulgarian legislation. Thus the Health Act (HA) prohibits the direct advertising of alcoholic drinks, while the indirect advertising of such drinks should satisfy a list of requirements. The HA also prohibits all types of advertising of non-conventional methods of medical treatment, as well as the advertising by medical persons and medical institutions of their activity. Recent amendments have been made to the specific regime for advertising set by the Medicine Products in Human Medicine Act, providing that only non-prescription medicines approved for use by the Executive Agency on Medicines (EAM) may be advertised. The effect of the previously existing prohibition for advertising of medicines used by prescription is now explicitly spread over advertising in internet and the press. An exception to the rule is advertising of vaccine campaigns, which however is subject to approval in each individual case by the EAM and should satisfy a number of criteria. When non-prescription medicines are advertised, there are limitations regarding the participation of medical specialists, the statements in the text of the commercials and the offering or promise for award or other benefit.

Other limitations are those in the Gambling Act prohibiting any direct advertising of gambling games by the mass media, the Religious Beliefs Act prohibiting the use of any temples, objects or persons connected with liturgical activity without the consent of the relevant religious authorities, the Tobacco and Tobacco Products Act imposing strict rules on the advertising of tobacco and tobacco products. Requirements regarding advertising are also contained in other sector-specific acts.

Financial services

- 16** Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and if so by whom and how?

As mentioned in question 6, the provision of distance financial services to consumers is regulated by the Provision of Distance Financial Services Act (PDFSA). This act generally implements the provisions of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. Thus the PDFSA ensures a certain level of protection to the consumers when receiving distant financial services, which corresponds to the requirements of the EU legislation.

Defamation

- 17** Are ISPs liable for content displayed on their sites?

This issue is regulated by the ECA. The provisions of this act aim mainly to limit the liability of ISPs by explicitly determining the cases where an ISP might not be held liable, which differ depending on the type of services provided (hosting, linking, caching, etc). Further, the lack of a general monitoring obligation on ISPs is also stated as a principle, providing that the ISP is obliged neither to monitor the information it stores, transmits or makes accessible in the process of provision of information society services, nor to look for facts or circumstances indicating illegal activity.

- 18** Can an ISP shut down a web page containing defamatory material without court authorisation?

Generally no restriction on this exists in the Bulgarian legislation and an ISP should be entitled to shut down a web page that contains clearly unlawful material where that possibility is provided in the general terms of the ISP or in the individual contract with the respective customer. A problem may occur where it is not certain if the material in question is in fact illicit as, if the material turns out to be lawful, the ISP may be held liable for non-performance of its contractual obligations.

Intellectual property

- 19** Can a website owner link to third-party websites without permission?

The issue is not explicitly regulated in the Bulgarian legislation and no court practice exists. However, as no prohibition is provided the conclusion may be drawn that it is generally permitted. However, a lot of factors should be considered mainly related to copyright and fair competition rules and advertising practices, for example where the website name represents trademark of a competitor. In such cases, the unauthorised linking may easily be considered as taking unfair advantage of the reputation of the competitor's mark. Problems may also be caused by 'deep linking', where the link leads directly to copyright-protected material.

- 20** Can a website owner use third-party content on its website without permission from the third-party content provider?

The Copyright and Related Rights Act provides as a general rule that any use of a third party's content should be duly authorised by the person owning the intellectual property rights to such content. Without such authorisation the use shall be considered to infringe the third party's rights and shall be deemed illegal. The same rule shall apply to the case in question.

21 Can a website owner exploit the software used for a website by licensing the software to third parties?

It depends on whether the website provider is the owner of the copyright over the relevant software. If the provider is the copyright holder, it may exploit the software in any way not prohibited by law. Where the website provider is only a licensee, it may sub-license the software only with the explicit consent of the copyright holder stipulated in its licence agreement.

22 Are any liabilities incurred by links to third-party websites?

Except for cases where the linking to third-party websites has been made without permission and certain liabilities may be incurred in the field of copyright protection or unfair competition and advertising, the provider may also be held liable for content-related issues in certain cases. However, the ECA seeks to limit that liability (see question 17).

Data protection and privacy

23 What legislation defines 'personal data' within the jurisdiction?

This matter is regulated by the Personal Data Protection Act (PDPA). According to this Act personal data shall be considered any information related to a natural person that has been identified or can be identified directly or indirectly through an identification number or through one or more specific indications. The PDPA generally implements the provisions of EU Directive 95/46 (the General Data Protection Directive). Special regulations are provided in the Electronic Communications Act and Ordinance No. 40 for Data Categories and the Order for Their Retention and Providing by the Undertakings Providing Public Electronic Communications Networks and/or Services for the Purposes of National Security and Detection of Crimes.

24 Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

According to the PDPA all the administrators or controllers of personal data are obliged to register as such with the Personal Data Protection Commission (PDPC). However, the administrator may commence processing once the application is filed (ie, prior to the actual registration).

Selling personal data is permissible provided that the administrator has informed the data subjects and has obtained their consent. However, the PDPA provides that the collected data may be processed only in certain cases and for certain purposes, exhaustively listed in the act. A general prohibition on the processing of sensitive data (data that disclose race or ethnic origin, political, religious or philosophical beliefs, as well as data related to health, sexual life or the human genome) is also provided, listing the cases where this prohibition shall not apply.

25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction?

No explicit restriction on profiling the customer database is provided in the PDPA. However, as pointed out in question 24, the processing of personal data is subject to certain requirements.

26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

It depends on where the company's server is located. Personal data transfer to a country that is a member of the EU or the European Economic Area is free, though it should be performed in compliance with the provisions of the PDPA. However, personal data transfer to other countries may be performed only if the relevant country ensures an adequate level of personal data protection. The assessment of the adequacy of the level of protection is made by the PDPC. This is not required in cases where there is a relevant decision of the European Commission, the consent of the data subject has been obtained prior to the transfer, or if the transfer is made for certain purposes, exhaustively listed in the PDPA (which are actually not applicable to the case in question).

Taxation

27 Is the sale of online products (for example, software downloaded directly from a website) subject to taxation?

The sale of online products is subject to taxation according to Bulgarian legislation. According to the Value Added Tax Act (VATA), the sale of digital products is subject to 20 per cent VAT. The sale of digitally downloaded products is considered as provision of services, since no delivery of tangible goods occurs. With regard to this, different tax regimes are applicable, depending on the nationality (place of business) of the supplier and the place of residence of the customer. These regimes are the same as in the other EU member states, as the VATA is harmonised with the EU legislation related to VAT matters.

28 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

Determining the tax liabilities that ensue from placing servers in jurisdictions other than the home jurisdiction of a company is a rather complex activity that includes the examination of the relevant tax regimes, and more specifically whether the placing of servers is considered a taxable permanent establishment in the other jurisdiction.

The question whether the placing of servers in Bulgaria by a foreign company shall expose it to local taxes is not given an explicit answer by the Bulgarian legislation. It should be noted that the Bulgarian tax authorities might consider this a permanent establishment, meaning that the activity might be levied with the relevant local taxes.

29 When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

The general rule according to the VATA is that a local company should register for VAT within 14 days of the end of the tax period during which its turnover has reached the amount of 50,000 leva (approximately €25,600). The registration should be with the respective office of the National Revenue Agency where the seat or the place of activity of the company is settled. It should also be noted that any company that has not reached the turnover required for the obligatory registration is entitled to voluntarily register itself for VAT.

Domestic internet sales in Bulgaria are subject to VAT at 20 per cent.

30 If an offshore company is used to supply goods over the internet, how will returns (goods returned in exchange for a refund) be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Where an offshore company is used to supply goods over the internet and such goods are delivered to individuals located in Bulgaria, these goods shall be subject to VAT, as well as the relevant customs duties. The individual customer who receives the goods shall be responsible for the import duty and indirectly for the VAT payment. Unless the goods are re-exported, refunds of import VAT and duty are not possible. In cases where the goods are returned to a Bulgarian address, no refund by the Bulgarian authorities shall be possible and the company may have to bear the cost of refunding the purchase price and an amount equivalent to the import duties and the VAT.

Gambling

31 Is it permissible to operate an online betting or gaming business from the jurisdiction?

Gambling in Bulgaria is subject to strict restrictions. The Gambling Act (GA) provides that only certain types of gambling activity are considered permissible and internet gambling is not among them. For the performance even of regulated types of gambling activity, permission has to be granted by the Gambling State Commission. Further, gambling should be organised only in legally determined places and should meet other legal requirements. In the event that the gambling activity is not in conformity with any of the above terms, it shall be considered a criminal offence in accordance with the Bulgarian Penal Code. However, a lot of discussions have been held recently with regard to the need for amendments in the GA and it is expected that in the near future online gambling may be legalised subject to certain conditions.

32 Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

As described in question 31, organising internet gambling is illegal in Bulgaria. According to the Penal Code anyone who systematically participates in illegally organised gambling activities commits a criminal offence, provided that he was aware of its illegality. However, where the online casino is not targeted at Bulgarian citizens (the servers are placed outside Bulgaria, the relevant website is not in the Bulgarian language, etc), the relevant foreign national legislation should apply.

Outsourcing

33 What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

Outsourcing contracts are not subject to express regulation by Bulgarian legislation. Hence the general rule for freedom in contracting provided in the Obligations and Contracts Act shall apply. As long as outsourcing is performed under an agreement between the parties, the key legal issues have to be stipulated in it. Among the most important of them are the scope of the relations, the performance criteria, the distribution of liability, the possibilities for termination of the agreement, etc. With regard to tax issues, it should be noted that at the present moment outsourcing activities to Bulgaria might be a good initiative considering that the corporate tax rate as of 1 January 2007 is 10 per cent – one of the lowest in the EU. As for VAT matters, the general rules shall apply.

Update and trends

In January 2008 the minister of the interior and the chairperson of the State Agency for Information Technologies and Communications jointly adopted Ordinance No. 40 for Data Categories and the Order for Their Retention and Providing by the Undertakings Providing Public Electronic Communications Networks and/or Services for the Purposes of National Security and Detection of Crimes. The Ordinance aims to implement Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. Soon after its publication in State Gazette, the ordinance has been appealed before the Supreme Administrative Court by the Program for Access to Information Foundation for alleged contradiction of the provisions of the Bulgarian Constitution, the ECHR, Directive 2006/24/EC and the Electronic Communications Act. In July 2008 the complaint was rejected by the first-instance court; a further appeal is expected, with a final decision to be issued by the second-instance court by the end of 2008.

34 What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

The particular rights of the employees in such cases depend on how the outsourcing is performed. The issue is not specifically regulated, meaning that the general rules of the Bulgarian Labour Code shall apply. In cases where the relevant activity is completely terminated and the outsourcing is followed by the mass firing of the employees who previously carried out the outsourced services, those employees shall have the right to prior information and consultation, usually through their syndicates. The non-observance of these employees' rights shall be considered a breach of the labour legislation. This rule is applicable to all employees in the jurisdiction.

Online publishing

35 When would a website provider be liable for mistakes in information that it provides online? Can it avoid that liability?

No special regulations in this regard exist in the Bulgarian legislation. The only provisions related to this issue are contained in the ECA and concern the liability of the providers of services for the automatic searching of information resources. According to the ECA, such providers shall not be held liable for the content of the information, provided that they do not start the transmission of the information; they do not choose the recipient of the information; and they do not choose or change the information. However, it is explicitly provided that these limitations of liability shall not apply where the information resources, from which the information is extracted, are owned by the provider or a related person. In these circumstances the general provisions of the civil and commercial law shall be applicable, where as a general principle it is provided that any preliminary limitation of liability in case of intent or gross negligence is considered void.

36 If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

The Copyright and Related Rights Act (CRRA) provides for the protection of a database producer by recognising its sui generis right to impose certain restrictions on the database use. Thus, database producers are entitled to prohibit the copying, as well as the repeated use of the whole or a material part (in quantity or in quality) of the database. This right survives 15 years as of the 1 January of the year following the year in which the database was completed. Certain restrictions on the possibility of exercising this right are also provided in the CRRA.

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