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Makris, Spiros

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INTERNATIONAL AND EUROPEAN BUSINESS AND COMPETITION LAW

Implementation of the Directive on Electronic Commerce into Greek Law and Consumers Protection in the Area of Electronic Commerce Comparison with German Law

*Spiros Makris, LL.M.**

I. Introduction

Over the years the internet has become a global electronic market place. Electronic commerce, the so-called E-commerce,¹ is considered to be one of the most promising forms of trading.² While E-commerce offers companies and consumers unique opportunities and advantages, at the same time it also involves specific risks for both parties.³ The creation of a predictable and safe legal framework regulating the area of E-commerce greatly helps to increase the confidence of all parties in this new form of doing business, which in turn is a requirement for its continued development.⁴

By adopting the Directive on electronic commerce⁵, a comprehensive set of rules relating to E-commerce has come into force. The provisions on consumer protection provided for in the Directive on electronic commerce are of great importance. They complement the set of rules provided for in the EC Directives on consumer protection which already exist⁶ and are intended to strengthen consumer protection in the area of E-commerce.⁷

This article has the objective of examining to what extent the rules which have recently been introduced in Greece have

improved consumer protection in the area of E-commerce. For this purpose this article will compare the new legislation introduced into Greek law with the set of rules which exist in German law to strengthen consumer protection in the area of E-commerce.

However, before examining in detail the provisions on consumer protection newly introduced into Greek law, it may be helpful to briefly outline the procedure of implementing the Directive on electronic commerce.

II. Implementing the Directive on electronic commerce into Greek law

In Greece, the Directive on electronic commerce was implemented by Decree 131/2003⁸. The enabling act which allows for the adoption of Decree 131/2003 is Statute 1338/1983⁹. This Statute is the main instrument for implementing all European Community legislation into Greek law.

1. Entering into force of Decree 131/2003

Although Decree 131/2003 was only adopted on 16 May 2003, it enters into force retrospectively with effect from 17 January 2002¹⁰ in accordance with Article 21. It remains unclear what induced the Greek legislator – apart maybe from his bad conscience due to the late implementation of the Directive on electronic commerce – to introduce the rules provided for by Article 21 of Decree 131/2003.¹¹

2. Systematic structure of Decree 131/2003

The systematic structure of Decree 131/2003 corresponds to

* Trainee Lawyer, Kastoria (GR), doctoral student at the Department of Private Law, Private International Law and International Civil Procedure, and Comparative Law (Prof. Dr. Rainer Hausmann), University of Constance (D).

¹ E-Commerce may principally be divided into two main areas: B2B (Business-to-Business) E-Commerce und B2C (Business-to-Consumer) E-Commerce, see *M. Köhler/H.-W. Arndt, Recht des Internet*, 2nd edition, Heidelberg (D) 2000, para. 83. A new area of E-Commerce rapidly gaining significance is C2C (Consumer-to-Consumer) E-Commerce, which as a rule covers the conclusion of consumer contracts in the context of Internet auctions.

² According to estimates, the turnover in the area of E-commerce in the EU will reach EURO 980 billion in the year 2004. See <http://www.ecommerce-digest.com/ecommerce-prospects-europe.html> (last visited on 26 April 2004).

³ See *I. Ιγγλεζάκης*, Προστασία του καταναλωτή στις τηλεαγορές μέσω Internet, Επιθεώρηση Εμπορικού Δικαίου (ΕΕμΔ) 2000 [*I. Igglezakis*, Protecting the consumer in the context of Internet shopping, *Journal of Commercial Law* (EEmD) 2000], 818, 822 *et seq.*; *E. Αλεξανδρίδου*, Η πρόταση οδηγίας της ΕΕ για το ηλεκτρονικό εμπόριο και η προστασία του καταναλωτή, *Δίκαιο Επιχειρήσεων και Εταιριών (ΔΕΕ)* 2000 [*E. Alexandridou*, The proposal for an EC Directive on electronic commerce and the protection of the consumer, *Law of Enterprises and Companies (DEE)* 2000], 113, 113.

⁴ See ground of consideration No. 7 of the Directive on electronic commerce.

⁵ 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 (OJ 2000, L 178, at 1).

⁶ Particularly Directive 97/7/EC on the protection of consumers in respect of distance contracts (OJ 1997, L 144, at 19).

⁷ See ground of consideration No. 11 of the Directive on electronic commerce.

⁸ Decree 131 of 30 April/16 May 2003 on the adaptation of Greek law to the requirements of Directive 2000/31 of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Government Gazette of the Greek Republic 2003, Volume A 116).

⁹ Statute No. 1338 of 17 March 1983 on the application of Community law (Government Gazette of the Greek Republic 1983, Volume A 34). Article 4 of Statute 1338/1983 was amended by Article 6(4) of Statute 1440/1984. Article 65 of Statute 1892/1990 amended Article 3 of Statute 1338/1983. Further, Article 7 of Statute 1775/1988, Article 31 of Statute 2076/1992 and Article 19 of Statute 2367/1995 have brought about changes concerning the temporal scope of application of Statute 1338/1983.

¹⁰ In accordance with Article 22(1) of the Directive on electronic commerce, member states were obliged to transform the provisions of the Directive into national law at the latest by 17 January 2001.

¹¹ Also the legality of these rules may be doubted. See Article 2 of the Greek Civil Code, which determines that “the Statute lays down provisions governing future cases, it does not apply retrospectively and it remains valid until it is explicitly or tacitly repealed by another legal rule”.

that of the Directive on electronic commerce. The Decree is divided into three parts: the first part contains the general provisions (Articles 1 and 2), the second part the basic principles (Articles 3 to 14) and the third one the provisions concerning the application of the Decree (Articles 15 to 21).

Article 1 of Decree 131/2003 contains the definitions required when applying the Decree. Article 20 establishes the scope of application as regards to the subject-matter regulated by the Decree. Articles 11 to 14 contain provisions relating to the liability of service providers of information society services and Article 18 contains rules relating to the organisation of the administrative authorities in charge of E-commerce. Provisions relating to consumer protection may in principle be found in Articles 4 to 6 and 9 to 10 of the Decree. Article 16 of the Decree, which deals with out-of-court settlement of disputes helps indirectly to strengthen consumer protection.

3. Basic principles of Decree 131/2003

According to the intention of the Greek legislator, Decree 131/2003 is to help achieve the free movement of information society services. This intention is without a doubt reflected in Article 2(2) and Article 3 of the Decree.¹² In accordance with Article 2(2) it is not allowed – with exception of the fields listed in Article 2(3) – to restrict the free movement of information society services from another Member State for reasons which are included in the coordinated field.¹³ Moreover, in accordance with Article 3 of the Decree it is not required – with exception of admission procedures which do not exclusively concern information society services or which are stipulated in Statute 2867/2000¹⁴ and Decree 157/1999¹⁵ – to subject a service provider to prior authorisation when taking up and pursuing the activity of information society services.

In addition, the country-of-origin principle as contained in the Directive on electronic commerce, is one of the main principles in the Decree.¹⁶ Article 2(1) of Decree 131/2003 stipulates that information society services which are performed either in Greece or in another Member State by a service provider established in Greece have to comply with national legislation covered by the coordinated field.

III. The provisions on consumer protection newly introduced by Decree 131/2003

As already mentioned above, it is in particular the provisions

of Articles 4 to 6 and 9 to 10 of Decree 131/2003 – which help to implement the Directive on electronic commerce – that are of great importance for strengthening consumer protection in the area of E-commerce. However, these provisions are not the only ones in Greek law which may be relied on for consumer protection when doing business over the Internet. In fact, the provisions of Decree 131/2003 are closely connected to the provisions of Statute 2251/1994¹⁷, which will be briefly introduced in the next paragraph.

1. Relationship between the provisions of Decree 131/2003 and Statute 2251/1994

The most important source of rules on consumer protection in Greece is Statute 2251/1994. It replaces¹⁸ Statute 1961/1991¹⁹ and has been supplemented and changed several times in the process of implementing the directives of the European Community.²⁰

Regarding consumer contracts that are concluded via the Internet in the context of E-commerce, Article 4 of Statute 2251/1994,²¹ which contains specific rules for distance contracts, is to be applied as a matter of principle.²²

The most important consumer protection instrument provided for by Article 4 of Statute 2251/1994 is the right of the consumer to terminate the contract (“Rücktrittsrecht”).²³ In

¹⁷ Statute No. 2251 of 15 November 1994 on the protection of the consumer (Government Gazette of the Greek Republic 1994, Volume A 191). A German translation may be found in *H. Freyer, Griechenland – Verbraucherschutzgesetz*, Cologne (D) 1995 and in *GRUR Int.* 1995, at 894 to 900.

¹⁸ See E. Αλεξανδρίδου, Ο ν. 2251/94 για την προστασία του καταναλωτή – Ομοιότητες και διαφορές από το ν. 1961/91 – Σχέσεις με το ν. 146/1914, Αρμενόπουλος (Αρμ.) 1996 [*E. Alexandridou*, Statute 2251/94 on the protection of the consumer – similarities and differences *vis-à-vis* Statute 1961/91 – relationship to Statute 146/1914, Armenopoulos (Arm.) 1996], 289 *et seqq.*

¹⁹ Statute No. 1961 of 3 September 1991 on the protection of the consumer and other provisions (Government Gazette of the Greek Republic 1991, Volume A 132). Comprehensively on Statute 1961/1991 *E. Alexandridou*, Die gesetzgeberische Entwicklung des Verbraucherschutz- und Wettbewerbsrechts in Griechenland, *GRUR Int.* 1992, 120 *et seqq.*

²⁰ Statute 2251/1994 has recently been amended by Statute 3043/2002 (Government Gazette of the Greek Republic 2002, Volume A 192), Ministerial Regulation Z 1-659/2002 (Government Gazette of the Greek Republic 2002, Volume B 1373) and Decree 301/2002 (Government Gazette of the Greek Republic 2002, Volume A 267).

²¹ The amended proposal for a Directive on the protection of consumers in respect of distance contracts (OJ 1993, C 308, at 18) formed the basis of the original version of Article 4 of Statute 2251/1994. In the process of transforming Directive 97/7/EC on the protection of consumers in respect of distance contracts into Greek law, Article 4 has been substantially changed by the Common Ministerial Regulation Z 1-496 of the Minister of Economic Affairs, the Minister of Justice and the Minister of Development of 7 February 2000 on distance contracts of sale, comparative advertising and the adaptation of Statute 2251/1994 on the protection of the consumer to the requirements of Directive 97/7/EC on the protection of consumers in respect of distance contracts (Government Gazette of the Greek Republic 2000, Volume B 1545).

²² See Γ. Καρακώστας, Το Δίκαιο του Internet – Νομική Αντιμετώπιση του Διαδικτύου, Νομικό Βήμα (NoB) 1998 [*G. Karakostas*, Law of the internet – legal evaluation of the web, Legal Tribune (NoB) 1998], 1172, 1176; *Igglezakis* (*supra* note 3), *EEmD* 2000, 818, 823 *et seq.* Same as *Alexandridou* (*supra* note 3), *DEE* 2000, 113, 118.

²³ In accordance with Article 4(12)(2) of Statute 2251/1994, the consumer cannot waive his right to terminate the contract, see Section 312 *et seq.* BGB. Explicitly on the requirements and the form of exercising the right to terminate the contract Γ. Καρακώστας, Προστασία του καταναλωτή, Αθήνα-Κομοτηνή 2002 [*G. Karakostas*, The protection of the consumer, Athen-Komotini 2002], at 141 *et seqq.*; *Igglezakis* (*supra*

¹² For more details, see *Igglezakis* (*supra* note 3), *EEmD* 2000, 818, 832.

¹³ Article 1(f) of Decree 131/2003 defines the coordinated field as “the requirements laid down by Greek law applicable to information society service providers or to information society services, regardless of whether they are of a general nature or specifically designed for them”.

¹⁴ Statute No. 2867 of 19 December 2000 “Organisation and function of telecommunications services and other provisions” (Government Gazette of the Greek Republic 2000, Volume A 273).

¹⁵ Decree 157 of 29 July 1999 on the granting of general authorisations and individual licences in the field of telecommunications services and for the implementation of Directive 97/13/EC of the European Parliament and of the Council (Government Gazette of the Greek Republic 1999, Volume A 153).

¹⁶ See *Alexandridou*, (*supra* note 3), *DEE* 2000, 113, 118 *et seq.* For more details on the principle of the country of origin *S. Ernst*, Verbraucherschutzrechtliche Aspekte des EU-Richtlinienvorschlags zum Electronic Commerce, *VuR* 1999, 397, 399 *et seqq.*

accordance with Article 4(10)(1) of Statute 2251/1994, the consumer has the right to terminate any distance contract without giving an explanation by sending back the goods in their original state within 10 working days²⁴ after receipt of the goods or services, unless a longer period of time for returning the goods was agreed.²⁵ Moreover, service providers are under a duty to provide information before²⁶ as well as after the conclusion of a contract.²⁷ The financial interests of consumers are in particular protected by Article 4(7)²⁸ and Article 4(11)²⁹ of Statute 2251/1994.

note 3), EEmD 2000, 818, 827.

²⁴ In accordance with Article 4(10)(3) of Statute 2251/1994, the distributor is obliged, in the case where the consumer effectively exercises his right to terminate the contract, to return payments made by the consumer within 30 days.

²⁵ In accordance with Article 4(10)(3) of Statute 2251/1994, the period within which the consumer has the right to terminate the contract where the duties to provide information of Article 4(9) are infringed covers three months. The sanction which applies to the distributor is that the right of termination is extended. If the distributor subsequently provides the above information within the three months' period of termination, the consumer must in terms of Article 4(10)(3) of Statute 2251/1994 exercise his right of termination within ten days from the moment that the information has been provided.

²⁶ In accordance with Article 4(2) of Statute 2251/1994, a distance contract is void as against the distributor, if the latter has not provided to the consumer prior to the conclusion of the contract and by means of the utilised means of distance communication at least the following information in a manner which is clear and according to the principle of good faith and fairness expected in negotiating commercial transactions: (a) the identity of the distributor; (b) the essential characteristics of the goods or the services; (c) the price, quantity, delivery costs and VAT charged, where this is not included in the purchase price; (d) the modalities of payment, delivery and fulfilment; (e) the period during which the offer of contract remains binding, also as regards to the price; (f) the right of the consumer to terminate the contract; (g) costs entailed for the consumer arising from utilising the relevant means of distance communication and which exceed normal basic rates; as well as the minimum duration of a contract for the delivery of goods or the performing of services, where this relates to services performed on a continuous or regularly recurring basis (h). This list is not exhaustive, as may be seen from the wording ("at least") of Article 4(2). Non-compliance with the duties to provide information of Article 4(2) causes the contract to become "relatively" invalid ("relative Nichtigkeit"), see *Karakostas* (*supra* note 23), at 141. This means that only the consumer may invoke the invalidity of the contract.

²⁷ In accordance with Article 4(9) of Statute 2251/1994, a distance contract is void as against the distributor, if the following information has not been provided in writing and in the same language used in the offer of contract to the consumer in time during the performance of the contract - in the case where the goods are not to be delivered to a third party, at the latest at the time of delivery: (a) the information mentioned in subsection 2 of the same Article; (b) the distributor's identity and the address of the branch of the distributor, situated nearest to the consumer; (c) the modalities of payment, including the terms of credit and instalments, as well as the terms of security arrangements; (d) the right to terminate the contract and on a separate sheet a sample of the declaration of termination of the consumer in terms of Article 4(10) of Statute 2251/1994; (e) information on customer services and the applicable terms of warranty; (f) as well as the terms to be observed in the case of termination of contracts concluded for an indefinite period or for a period of more than a year. Non-compliance with the duties to provide the information of Article 4(9) of the Statute, as where the duties of Article 4(2) of the Statute are infringed, causes the contract to become "relatively" invalid; see previous note.

²⁸ In accordance with Article 4(7) of Statute 2251/1994, the entire or partial collection of the purchase price, even in the form of a deposit, a surety, the issuing or acceptance of securities or in another form, prior to delivering the goods or performing the services is prohibited. These rules of the Greek law on consumer protection are unknown to the Directive on the protection of consumers in respect of distance contracts, see *Igglezakis* (*supra* note 3), EEmD 2000, 820, 828. Their effect is that the distributor's claim for payment of the purchase price arises only at the moment when the goods are delivered or the services are performed, see *Karakostas* (*supra* note 23), at 143.

²⁹ In terms of this provision, a consumer, who has exercised his right to terminate the contract, may, in the case where the purchase price has completely or partially been financed by a loan granted by the distributor or a third party on the basis of an agreement between the distribu-

The relationship between the provisions of Statute 2251/1994 mentioned above and the rules of Decree 131/2003 is determined in Article 4(12)(3) of the Statute. In accordance with this rule, Article 4 only applies in so far as there exist no specific provisions within the framework of Community law rules or legal rules contained in national law, which serve to implement Community legislation, that regulate comprehensively certain types of distance contracts or certain aspects of such contracts. Rules contained in national law in terms of Article 4(12)(3) of Statute 2251/1994 are in any case the provisions of Decree 131/2003, since, on one hand, they implement the provisions of the Directive on electronic commerce into Greek law and, on the other hand, contain provisions that concern a certain type of distance contracts, i.e. those distance contracts concluded by electronic means. Therefore it can be concluded that the new provisions of Decree 131/2003 regarding the conclusion of distance contracts in the area of E-commerce are to be applied at the same time as the rules of Article 4 of Statute 2251/1994 and in case they collide even have priority.

2. Details of the newly introduced rules of Decree 131/2003 relevant for consumer protection

First, it has to be clarified that the new provisions of Decree 131/2003 are not only rules on consumer protection.³⁰ They are in fact applied to all the legal relationships that arise between service providers and recipients of information society services. In terms of Article 1(4) of Statute 2251/1994 recipients of information society services may be consumers as well as distributors. The neutral wording of Article 1(d) of Decree 131/2003 covers both, i.e. the recipient of information society services is defined as "any natural or legal person who, for private ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible".³¹ Despite the fact that the nature of the rules of Decree 131/2003 is such that they help to strengthen other areas apart from consumer protection, they are of great importance in the effort to ensure effective consumer protection in the area of E-commerce. This may be seen from the fact that where one of the parties is a consumer it is not allowed to make any contractual arrangements that differ from those provided for in the Decree.³²

Since it is only the effects of the newly introduced provisions of Decree 131/2003 on consumer protection in the area of E-commerce which are the subject-matter of this article, the author will use below the term "consumer" instead of the term "recipient of information society services".

tor and the third party, in accordance with the Greek Civil Code also terminate the loan agreement without having to meet any obligation to pay damages. In terms of the same provision, the consumer may, however, demand that, in the case of the fraudulent use of his credit card, payment is cancelled and the amounts of money involved are credited to his account or returned to him.

³⁰ As in the case of Section 312e(1)(1)(2) 2 BGB in combination with Section 3 BGB-InfoVO; see *Ch. Berger*, in: *Jauernig, Bürgerliches Gesetzbuch – Kommentar*, 10th edition 2003, Section 312e, para. 1.

³¹ This definition has been copied verbatim from Article 2(a) of the Directive on electronic commerce.

³² See Article 9(1) and Article 10(1) of Decree 131/2003. In detail *Γ. Karakostas*, *Δίκαιο και Internet*, Αθήνα 2001 [*G. Karakostas*, *The law and the Internet*, Athen (EL) 2001], at 166 *et seq.*

i) General information

In accordance with Article 4(1) of Decree 131/2003, the service provider is under a duty – in addition to the information to be provided under Article 4(2) and Article 4(9) of Statute 2251/1994³³ – to render easily, directly and permanently accessible to the consumer and the competent authorities, at least the following information: (a) the name of the service provider; (b) the geographic address at which the service provider is established; (c) the details of the service provider, which allow him to be contacted rapidly and communicated with in a direct and effective manner, including his electronic mail address; (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; (e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority; (f) as concerns the regulated professions, the professional body or similar institution with which the service provider is registered, the professional title and the Member State where it has been granted and a reference to the applicable professional rules in the Member State of establishment and the means to access them; (g) in cases where the service provider undertakes activities that are subject to VAT, the identification number in accordance with Article 36 of Statute 2859/2000³⁴. Where information society services refer to prices, in accordance with Article 4(2) of Decree 131/2003, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

In contrast to the information to be provided before as well as after the contract is concluded as stated in Article 4(2) and Article 4(9) of Statute 2251/1994 already mentioned above, the information listed in Article 4 of Decree 131/2003 does not depend on whether or not a contract was concluded,³⁵ i.e. this information has to always be available and must be provided independently of whether or not a contract in the area of E-commerce was concluded. This may be seen from the unambiguous wording of Article 4(1) of the Decree (“always”).

For example, where a distributor uses a passive website – a website which exists exclusively for the presentation of a product and which does not allow for a contract to be concluded electronically – he is not under a duty to provide the consumer with the information stipulated in Article 4(2) and Article 4(9) of Statute 2251/1994. However, he is obliged to provide the consumer with the information as imposed on him by Decree 131/2003. In contrast, where a distributor operates an active website which allows for contracts to be concluded via the Internet, he is under a duty to provide the information as imposed by Article 4 of Decree 131/2003 as well

as Article 4(2) and Article 4(9) of Statute 2251/1994.³⁶

ii) Provisions of Decree 131/2003 regarding the process of concluding contracts by electronic means

In Articles 9 and 10 of Decree 131/2003, which have the same wording as Articles 9 and 10 of the Directive on electronic commerce, a number of requirements are stipulated that relate to the process of concluding contracts by electronic means. As already mentioned above, while both provisions do not exclusively relate to consumer protection, they are very important to strengthen consumer protection in the area of E-commerce. In Article 9 of Decree 131/2003, a service provider of information society services is subjected to a duty to provide certain information. Article 10 of Decree 131/2003 provides a number of principles for placing orders by electronic means. Both provisions stipulate that where one of the parties is a consumer it is not allowed to make different contractual arrangements than provided for in these provisions.

Before examining any closer the provisions of Articles 9 and 10 of Decree 131/2003, the exceptions to the scope of the applicability of both provisions stated in Articles 9(3) and 10(2) of the Decree have to be considered. In accordance with Articles 9(3) and 10(2) of Decree 131/2003, the provisions of Articles 9 and 10 do not apply to contracts which were concluded solely by exchanging electronic post or equivalent individual communications. This covers, for example, contracts which were not concluded by using the site containing the online form of the distributor, but by exchanging e-mails.³⁷ The exemptions provided for in Articles 9(3) and 10(2) of the Decree should under no circumstances result in service providers being able to circumvent the provisions of the Decree which are to strengthen consumer protection.³⁸ Therefore, mass e-mails which are drafted in a way that they allow for the conclusion of an unlimited number of contracts may not be classed as individual communication in terms of Articles 9(3) and 10(2) of Decree 131/2003.³⁹

a) Information to be provided by service providers

Article 9 of Decree 131/2003 establishes a number of information duties to be fulfilled by service providers of information society services, aiming to make transparent the process of concluding contracts by electronic means. Therefore the information required in accordance with Article 9(1) of the Decree should be made available before the consumer places his order, i.e. before the first data concerning the subject-matter of the contract is transmitted electronically.⁴⁰

In addition to the other information requirements, Arti-

³⁶ Igglezakakis (*supra* note 3), EEmD 2000, 818, 833.

³⁷ The conclusion of a contract by exclusively making use of e-mails is rather unusual in the area of electronic commerce. In relation to Article 9(3) of Decree 131/2003, one should always also take account of Article 4(6) of Statute 2251/1994. In accordance with Article 4(6) of Statute 2251/1994, the distributor may not make use of e-mails to transmit an offer of contract to the consumer without the latter's prior consent.

³⁸ See ground of consideration No. 39 of the Directive on electronic commerce. Karakostas (*supra* note 32), at 168 also warns against this danger.

³⁹ The view is also shared by Ch. Wendehorst, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 2a, Schuldrecht Allgemeiner Teil (Sections 241-432), 4th edition, Munich (D) 2003, Section 312e BGB, para. 47.

⁴⁰ See with regard to German law Wendehorst, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (*supra* note 39), Section 312e BGB, para. 70.

³³ This concerns the already mentioned information to be provided before and after the conclusion of the contract contained in the special provisions of Article 4 of the Greek Statute on the protection of consumers in respect of distance contracts.

³⁴ Statute No. 2859 of 7 November 2000 “Ratification of the Code on VAT” (Government Gazette of the Greek Republic 2000, Volume A 248).

³⁵ See Nordhausen, Die E-Commerce-Richtlinie 2000/31 und ihre Auswirkungen auf das deutsche und schweizerische Recht, insbesondere das Verbraucherrecht, in: Jahrbuch Junger Zivilrechtswissenschaftler 2001, 287, 296; Ernst (*supra* note 16), VuR 1999, 397, 401.

cle 9(1) of Decree 131/2003 states that at least the following information should be given by the service providers clearly, comprehensible and unambiguously and prior to the order being placed by the consumer: (a) the different technical steps to follow to conclude the contract; (b) information as to whether or not the concluded contract will be filed by the service provider and whether it will be accessible; (c) the technical means for identifying and correcting input errors prior to the placing of orders; (d) the languages offered for the conclusion of the contract; (e) any codes of conduct⁴¹ to which the service provider subscribes, including information on how these codes can be consulted electronically. Moreover, in accordance with Article 9(2) of the Decree, the terms of the contract and the standard terms and conditions have to be provided to the consumer in a way that allows him to store and reproduce them.

The aim of the rules provided for in Article 9(1)(a) of Decree 131/2003 is to remove the uncertainty the consumer is subjected to when concluding a contract, i.e. whether or not a contract was concluded and when it was concluded. The consumer is to receive information on the legal effects of the various transactions he carries out by electronic means. As a result the consumer should, for example, be informed whether filling the electronic shopping cart or sending a completed electronic form represents an offer which is legally binding in terms of Article 185 of the Greek Civil Code or whether it is an *invitatio ad offerendum*.⁴²

It is also important to inform the consumer how he may correct any input errors prior to placing his order. Article 9(1)(c) of Decree 131/2003 establishes that such information has to be given by the service provider. In contrast, Article 9(1)(c) of Decree 131/2003 – although not clearly expressed in its wording⁴³ – does not impose a duty on the service provider to give to the consumer the required technical means to correct any input errors. This duty is established in Article 10(1) of the Decree which will be closer examined below.

Moreover, providing the consumer with information on the languages offered for the conclusion of a contract represents an additional important instrument to ensure transparency when concluding contracts by electronic means. Article 9(1)(d) of Decree 131/2003, however, does not impose a duty on the service provider to allow for different languages when concluding a contract by electronic means.⁴⁴

In addition, it has to be assumed that the service provider

fulfils his duty of supplying the information as required in Article 9(2) of Decree 131/2003, if he gives the consumer the option to access and store by electronic means the terms of the contract (e.g. by “downloading” the standard terms and conditions).⁴⁵

b) Basic principles for placing an order by electronic means

In accordance with Article 11(1) of Decree 131/2003, the following principles apply when a consumer is placing an order: Firstly, the service provider has to acknowledge the receipt of the consumer's order by electronic means; secondly, the order and the acknowledgment of receipt are deemed to be received when the parties to whom they are addressed are able to access them⁴⁶ and thirdly, the service provider is placed under a duty to make available to the consumer appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

The acknowledgement of the receipt of the consumer's order required in accordance with Article 11(1) of Decree 131/2003 is like carrying out a business act and has to be differentiated from the declaration of acceptance by the service provider.⁴⁷ Where the service provider – by referring to the consumer's order – declares that he accepts the offer, this may – according to the author's view – be sufficient to be considered as an acknowledgement of order in terms of Article 10(1) of Decree 131/2003.⁴⁸ However, an acknowledgement of re-

⁴⁵ See Igglezakis (*supra* note 3), EEmD 2000, 818, 835.

⁴⁶ These provisions appear to be superfluous in as far as receipt of the order of the consumer is concerned (not, however, in as far as that of the acknowledgement of receipt, which does not constitute a declaration of intent and with regard to which Articles 167 *et seqq* of the Greek Civil Code are not immediately applicable, is concerned), as the receipt of electronically transmitted declarations of intent is governed by the rules of the General Part of the Greek Civil Code, in particular Articles 167 *et seqq*; see A. Παπαθωμά-Μπέτγκε, Ηλεκτρονικό εμπόριο: Νομικά ζητήματα κατά τη σύναψη εμπορικών συμβάσεων στο Internet, Δίκαιο Επιχειρήσεων και Εταιριών (ΔΕΕ) 1999 [A. Papathoma-Baetge, E-Commerce: Legal questions arising in the context of the conclusion of contracts in the Internet, Law of Enterprises and Companies (DEE) 1999], 1237, 1239; N. Ψούνη-Ζορμπά, Δήλωση βουλήσεως μέσω ηλεκτρονικού υπολογιστή – Ένταξη στο σύστημα του ΑΚ, δυνατότητες ακύρωσης, Θεσσαλονίκη 1988 [N. Psouni-Zorba, Declarations of intent via the computer – inclusion in the system of the civil code – possibilities for rescission, Thessaloniki (EL) 1988], at 106 *et seqq*; A. Γεωργιάδης, Γενικές Αρχές Αστικού Δικαίου, 2. Έκδοση, Αθήνα-Κομοτηνή 1997 [A. Georgiadis, The general part of civil law, 2nd edition, Athen-Komotini (EL) 1997], Section 33, para. 60. German legal writers, however – correctly in this author's view – do not regard it as correct to hold that the definition of receipt of the order and the confirmation of receipt has been formulated as a fiction; see in this regard H. Heinrichs, in: Palandt, Bürgerliches Gesetzbuch, 63rd edition 2004, Section 312e BGB, para. 7; H.W. Micklitz, in: W. Kohte/ H.W. Micklitz/ P. Rott/ K. Tonner/ A. Willingmann, Das neue Schuldrecht – Kompaktcommentar, Neuwied (D) 2003, Section 312e BGB, para. 65; M. Ultsch, in: M. Schwarz/ A. Peschel-Mehner (eds.), Recht im Internet, loose-leaf-collection, Augsburg (D) 2002, chapter 3.3, para. 50.

⁴⁷ The opinion presumably prevailing among Greek legal writers is that the consumer is the person who makes a legally binding offer to conclude an electronic contract, as a website as a rule merely constitutes an *invitatio ad offerendum*. The acceptance of the consumer's offer can occur either by sending an e-mail, or, in accordance with Article 193 of the Greek Civil Code, by sending the ordered goods to the consumer; see Σ. Μουζουλιάς, Συναλλαγές διαμέσω του Internet, Ελληνική Δικαιοσύνη (ΕΛΛΔΙΚ) 1998 [S. Mouzoulas, Business transactions via the Internet, Greek Justice (ELLIDIK) 1998], 15, 20; Igglezakis (*supra* note 3), EEmD 2000, 818, 824; a.A. Karakostas (*supra* note 32), at 173.

⁴⁸ The same applies also in terms of German law, see H. Dörner, Rechtsgeschäfte im Internet, AcP 2002, 363, 378; Ch. Glatt, Vertragsschluss im Internet – Die Artikel 9 bis 11 der E-Commerce-Richtlinie und ihre Umsetzung im deutschen Recht, ZUM 2001, 390, 393; Grigoleit (*supra* note 44), NJW 2002, 1151, 1158; Wendeborst, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (*supra* note 39), Section 312e BGB,

⁴¹ This refers to professional codes of conduct which the distributor voluntarily submits himself to. In accordance with Article 15 of Decree 131/2003, codes of conduct, which are drawn up by professional or consumer associations, must be accepted by the Minister of Development and must be published in the Government Gazette of the Greek Republic.

⁴² The same applies with regard to the identical provisions in Section 312e(1)(1)(2) BGB in combination with Section 3(1) BGB-InfoVO, see Wendeborst, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (*supra* note 39), Section 312e, para. 78.

⁴³ See the much clearer wording of the corresponding provisions of Section 3(3) BGB-InfoVO “(...) how he can, with the technical means placed at his disposal, identify and correct input errors prior to placing the order”.

⁴⁴ The same applies with regard to German law, in accordance with the identical provisions of Section 312e(1)(1)(2) BGB in combination with Section 3(4) BGB-InfoVO; see Wendeborst, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (*supra* note 39), Section 312e, para. 85; H-S. Grigoleit, Besondere Vertriebsformen im BGB, NJW 2002, 1151, 1158.

ceipt may also take place where the service provider renders the paid services online.⁴⁹ The transmission of the acknowledgement of receipt is to take place without undue delay in accordance with Article 10(1) of Decree 131/2003. In the area of E-commerce it may be assumed that due to the great transmission speed usual for the Internet, the acknowledgement of the consumer's order has to be sent within a few minutes.

Moreover, in order to comply with the requirements of Article 10(1) of Decree 131/2003, service providers have to design the order function in a way that the consumer has the possibility to check and correct his details prior to each transmission that concerns the subject-matter of the contract.⁵⁰ For example, prior to giving the final transmission command, the consumer should be in a position to read through and correct the electronic order form already completed by him.

iii) Basic principles of commercial communication

Article 1(f) of Decree 131/2003 defines the term of commercial communication as "any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession". Therefore Article 1(f) of the Decree covers all kinds of direct and indirect advertising.⁵¹

Article 5 of Decree 131/2003 determines a number of transparency requirements which have to be met by advertising in the area of E-commerce.⁵² In accordance with Article 5, commercial communication which is part of, or constitutes, an information society service has to comply at least with the following: (a) the commercial communication has to be clearly identifiable as such; (b) the natural or legal person on whose behalf the commercial communication is made has to be clearly identifiable; (c) where promotional offers, such as discounts, premiums and gifts, are permitted, they have to be identifiable as such, and the conditions which are to be met to qualify for them have to be easily accessible and presented clearly and unambiguously; (d) where promotional competitions or games are permitted, they have to be clearly identifiable as such, and the conditions for competition have to be easily accessible and be presented clearly and unambiguously.

The rules provided for in Article 5 of Decree 131/2003 complement the already existing and very comprehensive rules in Article 9 of Statute 2251/1994⁵³ on illegal advertising.⁵⁴

Both provisions are to increase the effectiveness of protecting consumers against unfair business practices, which are not that uncommon in the area of E-commerce.⁵⁵

Additional rules on commercial communication in the area of E-commerce are contained in Article 6 of Decree 131/2003. In accordance with Article 6(1) of the Decree, unsolicited commercial communication by electronic mail, where permitted, has to be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

The transparency requirements contained in Article 6(1) of Decree 131/2003 on unsolicited advertising e-mails are, however, irrelevant, as Article 9(10) of Statute 2251/1994 does not allow the sending of e-mails containing promotion without expressed approval by the consumer⁵⁶ (the so-called "spamming").⁵⁷ Naturally, commercial communication which is not even allowed to be sent, does not have to comply with any transparency requirements.⁵⁸

iv) Sanctions when failing to fulfil the provisions of the Decree 131/2003

Article 19 of Decree 131/2003 states that the sanctions provided for in Article 14(3) of Statute 2251/1994 and in the Market Regulation Code will apply when the provisions of the Decree are infringed. In accordance with Article 14(3) of Statute 2251/1994, each time the rules of the Statute are infringed

para. 94.

⁴⁹ See ground of consideration No. 38 of the Directive on electronic commerce. It remains unclear whether the physical delivery of goods which have been ordered online suffices as confirmation, since the confirmation of receipt must occur by electronic means; see *Glatt* (supra note 48), ZUM 2001, 390, 393.

⁵⁰ As has already been indicated above, the duty of the service provider to inform the consumer on how to make use of the technical means for identifying and correcting his input data is laid down in Article 9(1)(c) of Decree 131/2003.

⁵¹ Concerning the identical term used in Article 2(f) of the Directive on electronic commerce, see *Ernst* (supra note 16), VuR 1999, 397, 398.

⁵² See *Alexandridou* (supra note 3), DEE 2000, 113, 116.

⁵³ Article 9 of Statute 2251/1994 has been substantially amended in December 2000 in the course of transforming Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising into national law (OJ 1997, L 290, at 18) by Article 3 of the Common Ministerial Regulation Z 1-496/2000.

⁵⁴ In Greek legal literature, no doubt exists these days that the rules contained in Article 9 of Statute 2251/1994 are applicable in the field of advertising in the Internet; see *Igglezakis* (supra note 3), EEmD 2000, 818, 830; *Karakostas* (supra note 32), at 213.

⁵⁵ See ground of consideration No. 29 of the Directive on electronic commerce.

⁵⁶ Article 1(4)(a) of Statute 2251/1994 determines that "every person receiving an advertising message is a recipient". As to this very wide interpretation of the concept "consumer", see *E. Παράκης, Η έννοια του καταναλωτή κατά το νέο ν. 2251/94, Δίκαιο Επιχειρήσεων και Εταιριών (ΔΕΕ) 1995* [E. Perakis, The concept of consumer in terms of the new Statute 2251/94, Law of Enterprises and Companies (DEE) 1995], 32 *et seqq*; *Karakostas* (supra note 23), at 50 *et seqq*; highly critical *Alexandridou* (supra note 18), Arm. 1996, 289, 290 *et seq*.

⁵⁷ With regard to the transmission of unsolicited advertising e-mails, Greek law follows the so-called opt-in solution. The provisions of Greek law are consistent with Community law, since Article 7 of the Directive on electronic commerce leaves it to member states whether or not to introduce an opt-out solution with regard to unsolicited e-mail advertising; see *Igglezakis* (supra note 3), EEmD 2000, 818, 834; *Alexandridou* (supra note 3), DEE 2000, 113, 124. See also grounds of consideration Nos 30 and 31 of the Directive on electronic commerce. German law also follows the opt-in solution, see *Wendehorst*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (supra note 39), Section 312c BGB, para. 126; LG Trautstein (D), K&R 1998, 117; LG Berlin (D), CR 1998, 499; LG Hamburg (D), CR 1999, 326; LG Ellwangen/Jagst (D), CR 2000, 188 *et seqq*.

⁵⁸ The conflict between Article 6 of Decree 131/2003 and Article 9(10) of Statute 2251/1994 is obvious. The question arises whether Article 6 of Decree 131/2003 invalidates the rules contained in Article 9(10) of Statute 2251/2003, and whether it replaces the already existing user-friendly opt-in solution with regard to the unsolicited transmission of advertising emails with the opt-out solution, which is not as user-friendly. Against such a finding, one may, in this writer's view, refer, on the one hand, to the neutral wording of Article 6(1), which does not create the impression that the Greek legislator wishes to abrogate any rules, which he itself describes as "revolutionary" in its introductory report to Statute 2251/1994 and, on the other hand, to the fact that the Directive on electronic commerce does not lay down a duty of member states to introduce the opt-out solution and thus does not force them to abrogate Article 9(10) of Statute 2251/1994. If one proceeds from the virtually identical wording of Article 6 of Decree 131/2003 and of Article 7 of the Directive on electronic commerce, one cannot exclude that the Greek legislator accidentally forgot to take account of the rules contained in Article 9(10) of Statute 2251/1994 when transforming the Directive on electronic commerce into national law. It is for the legislator and the courts to clarify the current uncertain legal situation.

by distributors, the Minister of Trade imposes an administrative fine of GRD 500.000 up to 20.000.000.⁵⁹ In case the provisions are infringed again, the upper limit of the administrative fine doubles. In case of repeated recurrence, the Minister of Trade may order the business or part of the business – after the National Consumer Council has given its comment on the case – to cease trading for up to one year.

The sanctions contained in Article 19 of the Decree 131/2003 are of little relevance to the consumer, since they do not directly affect the rights of the consumer. In the opinion of the author, it would also be preferable, if not necessary, for Greek law to contain rules – as German law does – to punish a service provider in the area of E-commerce when he fails to fulfil his duties. Under German law, if this is the case, the period within which a consumer has the right to withdraw from a distance contract is deferred.⁶⁰

IV. Comparison to German Law

Under German law the consumer in the area of E-commerce is in principle protected by Sections 312b to 312f and Sections 355 to 359 BGB [Bürgerliches Gesetzbuch – German Civil Code]. These provisions help to strengthen consumer protection regarding distance contracts. The scope of application of the law of distance contracts is regulated in Section 312b BGB.⁶¹ The information to be provided by the entrepreneur when using distance contracts is stated in Section 312c BGB in combination with Section 1 BGB-InfoVO⁶² [Verordnung über Informationspflichten nach bürgerlichem Recht – Regulation on the information to be provided in accordance with German Civil Law]. In accordance with Section 312d BGB, the consumer is granted the right to withdraw from the contract whereby Sections 355 to 359 BGB regulate how this right may be exercised and the legal consequences it may have. The duties of the entrepreneur in the area of E-commerce imposed by Section 312e BGB are of great importance for the protection of consumer interests.

When comparing the rules on consumer protection that exist in German law with those in Greek law, it may be concluded that they are almost the same. The wording of the information to be provided by the distributor to the consumer in accordance with Article 4(2) and Article 4(9) of Statute 2251/1994 when using a distance contract is almost the same as that of the information to be provided under Section 312c in combination with Section 1 BGB-InfoVO.⁶³ In both legal

systems the consumer, when using contracts relating to the area of E-commerce, is granted a right to withdraw from the contract⁶⁴ and both systems provide that, where this right is effectively performed, the consumer may also terminate linked loan agreements.⁶⁵ In addition, the duties of an entrepreneur in the area of E-commerce regulated in Section 312e BGB in combination with Section 3 BGB-InfoVO and those imposed by Articles 9 and 10 of the Decree are identical. The same applies to the German and Greek rules on the general information requirements of a distributor in the area of E-commerce that are laid down in Article 4 of Decree 131/2003 and Section 6 TDG [Teledienstgesetz – Statute on the Use of Teleservices].⁶⁶

While it is obvious that the provisions contained in Greek and German law relating to consumer protection in the area of E-commerce – which are both strongly influenced by the European Directives on consumer protection – are largely the same, there exist certain differences which result from the different methods used to implement the Community law provisions and which will be briefly outlined below. One of the differences between German and Greek law consists of the legal consequences where the entrepreneur fails to fulfil the information requirements when using distance contracts. According to German law, when the entrepreneur infringes the provisions that impose the duty to supply certain information the concluded contract remains legally effective.⁶⁷ In contrast, according to Article 4(2) and Article 4(9) of the Greek Statute 2251/1994, when the distributor does not fulfil the information requirements the contract becomes invalid (“relative Nichtigkeit”),⁶⁸ but only the consumer may rely on this fact.

duty of the entrepreneur does not exist in German law.

⁶⁴ A difference between German and Greek law exist only with regard to the period within which the consumer has the right to withdraw from the contract. In accordance with Article 4(10) of Statute 2251/1994, the ordinary period to terminate a contract covers ten working days. Compared to that, the ordinary period to withdraw from the contract in terms of Section 355(1)(2) BGB covers two weeks. Furthermore, the rules contained in Section 355(3)(1) BGB, to the effect that the consumer's right to withdraw from the contract expires at the latest six months after the conclusion of the contract is unknown in Greek law. Moreover, the period to withdraw from the contract in terms of Section 312d(2) BGB does not begin prior to fulfilment of the duty to provide information after the conclusion of the contract. Article 4(1)(2) of Statute 2251/1994 on the contrary does not envisage such a legal consequence, but sanctions the non-fulfilment of the duty of the distributor to provide information after the conclusion of the contract only by extending the right to terminate the contract to three months.

⁶⁵ See Sections 358, 359 BGB und Article 4(11) of Statute 2251/1994.

⁶⁶ The German statute on the use of teleservices (Teledienstgesetz - TDG) of 22 July 1997 (German Federal Gazette (Bundesgesetzblatt - BGBl.) I at 1870) has been substantially amended by the Statute providing for general legal conditions regarding electronic commerce (Elektronischer Geschäftsverkehr – Gesetz – EGG) of 14 December 2001 (German Federal Gazette (Bundesgesetzblatt – BGBl.) I at 3721) and adapted to the requirements of the Directive on electronic commerce.

⁶⁷ See *M. Meub*, Fernabsatz und E-Commerce nach neuem Recht, DB 2002, 359, 362; *G. Ring*, in: B. Dauner-Lieb/T. Heidel/M. Lepa/G. Ring (ed.), *Anwaltkommentar zum Schuldrecht*, Bonn (D) 2002, Section 312c BGB, para. 69. In the case of infringement of the duties of Section 312c(2) in combination with Section 1(1) BGB-InfoVO, claims of the consumer for damages arise in terms of Sections 280(1), 241(2), 311(2) BGB, which have their basis in *culpa in contrahendo*. If the distributor infringes the duties to provide information of Section 312c(2) in combination with Section 1(2) and (3) BGB-InfoVO, the consumer has claims for damages in terms of Sections 280(1), 242(2) BGB arising from breach of contract; see *Heinrichs*, in: Palandt (*supra* note 46), Section 312c BGB, para. 10; *P. Bülow/M. Artz*, Fernabsatzverträge und Strukturen eines Verbraucherprivatrechts im BGB, NJW 2000, 2049, 2054; *Berger*, in: Jauernig (*supra* note 30), Section 312c BGB, para. 5.

⁶⁸ See *supra* note 26.

⁵⁹ This involves an amount of about EURO 1 470 to 58 800.

⁶⁰ See Section 312e(3)(2) BGB. See also *Ch. Schneider*, Zur Umsetzung der E-Commerce-Richtlinie im Regierungsentwurf zur Schuldrechtsmodernisierung, K&R 2001, 344, 348, who considers deferral of the period within which a consumer has the right to withdraw from the contract to be a too far-reaching sanction in the case of non-compliance with the duties of Section 312e(3)(2) BGB.

⁶¹ Concerning the contracts excluded from the scope of application as regards the subject-matter of the law of distance contracts, it is remarkable that Section 312b(3) BGB contains a much more extensive catalogue of excluded contracts than Article 4(13) of Statute 2251/1994.

⁶² Regulation on the duties to provide information and to produce supporting evidence according to civil law (Verordnung über Informations- und Nachweispflichten nach bürgerlichem Recht), proclamation of 5 August 2002 (German Federal Gazette (BGBl.) I at 3002).

⁶³ Solely Article 4(9)(d) of Statute 2251/1994 constitutes an exception. It provides for a duty of the distributor to furnish the consumer with a sample of his declaration of termination on a separate sheet. Such a

Moreover, it should be taken into account that an important rule for consumer protection in the area of E-commerce, such as Article 4(7) of Statute 2251/1994, which does not allow the distributor to collect the amount due as purchase price, not even in the form of deposits, surety, drawing up and issuing securities or in any other form, prior to delivering the goods or performing the services, does not exist in German law.⁶⁹

As already mentioned above, there exist different rules in German and Greek law regarding the legal consequences where an entrepreneur in the area of E-commerce infringes the special duties imposed on him. According to Section 312e(2)(2) BGB, the sanction for not providing the information as determined in Section 312e(1)(1) is that the period within which the consumer may withdraw from the contract is deferred until such information is supplied. Greek law does not contain provisions having the same legal consequences when the duties imposed by Articles 9 and 10 of Decree 131/2003 are not fulfilled. In such a case, the Greek law limits the sanctions against the distributor to imposing a fine.

V. Summary

With Decree 131/2003 entering into force, the Greek legislator has made an important contribution to the creation of a harmonised legal framework in the area of E-commerce in Europe and at the same time has established a basis for the development of the area of E-commerce in Greece.

The aim of Decree 131/2003 is two-fold: legal uncertainties are to be removed in order to advance the commercial use of the Internet. At the same time consumer protection in the area of E-commerce is to be optimised. Apart from the problematic rule contained in Article 6 of the Decree, consumer protection in the area of E-commerce has been considerably strengthened by the general information duties of the service provider of information society services established in Article 4, the principles on placing an order by electronic means laid down in Articles 9 and 10 as well as by the rules on commercial communication determined in Article 5. The above mentioned rules of Decree 131/2003 together with the rules in Article 4 of Statute 2251/1994, which are normally applicable when concluding contracts in the area of E-commerce, ensure that consumers are protected very effectively. This also becomes clear when comparing Greek law with German law. In essence, with the newly introduced legislation into Greek law it has never been safer for the consumer to participate in E-commerce.

⁶⁹ See *supra* note 28.

ECJ 29 April 2004 – C-418/01 – IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG

Article 82 EC – Competition – Abuse of a dominant position – Brick structure used to supply regional sales data for pharmaceutical products in a Member State – Copyright – Refusal to grant a licence

1) For the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence

for a brick structure protected by copyright which it owns is abusive, the degree of participation by users in the development of that structure and the outlay, particularly in terms of cost, on the part of potential users in order to purchase studies on regional sales of pharmaceutical products presented on the basis of an alternative structure are factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind.

2) The refusal by an undertaking which holds a dominant position and owns a copyright of a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled:

the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the copyright owner and for which there is a potential consumer demand;

the refusal is not justified by objective considerations;

the refusal is such as to reserve to the copyright owner the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.

Facts: IMS provides data on regional sales of pharmaceutical products in Germany to pharmaceutical laboratories formatted according to the brick structure. Since January 2000 it has provided studies based on a brick structure consisting of 1860 bricks, or a derived structure consisting of 2847 bricks, each corresponding to a designated geographic area. According to the order for reference, those bricks were created by taking account of various criteria, such as the boundaries of municipalities, post codes, population density, transport connections and the geographical distribution of pharmacies and doctors' surgeries.

Several years ago IMS set up a working group in which undertakings in the pharmaceutical industry, which are clients of IMS, participated. That working group makes suggestions for improving and optimising market segmentation. The extent of the working group's contribution to the determination of market segmentation is a subject of dispute between IMS and NDC.

The national court found that IMS not only marketed its brick structures, but also distributed them free of charge to pharmacies and doctors' surgeries. According to the national court, that practice helped those structures to become the normal industry standard to which its clients adapted their information and distribution systems.

After leaving his post in 1998, a former manager of IMS created Pharma Intranet Information AG ("PII"), whose activity also consisted in marketing regional data on pharmaceutical products in Germany formatted on the basis of brick structures. At first, PII tried to market structures consisting of 2201 bricks. On account of reticence manifested by potential clients, who were accustomed to structures consisting of 1860 or 2847 bricks, it decided to use struc-