

Recent developments in European e-commerce law, with case studies

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(1) Directive 2000/31/EC on Electronic Commerce

What were the reasons for the Directive?

The Directive aims

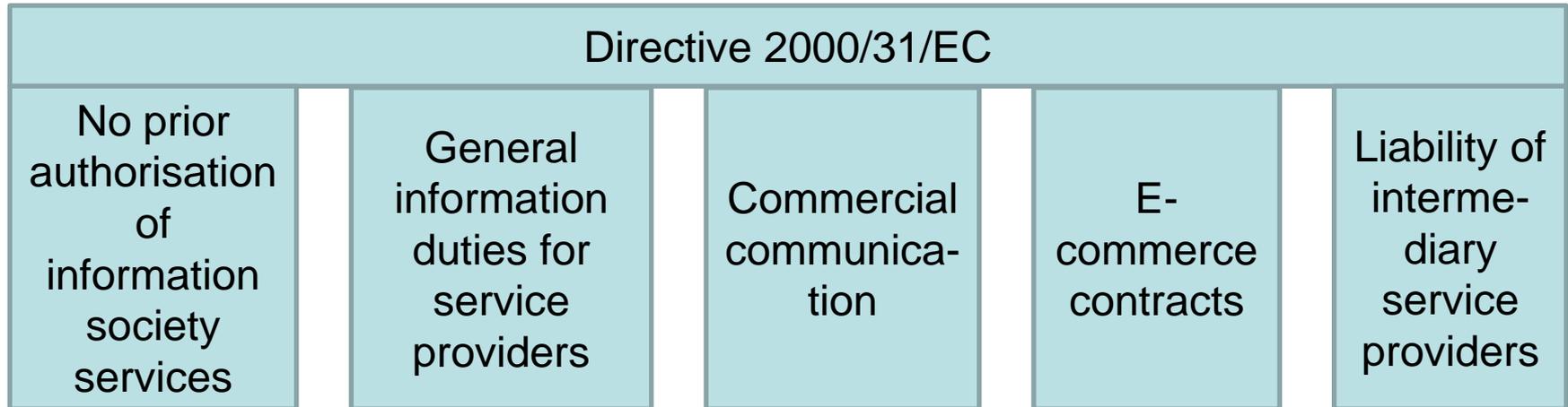
- to ensure an internal market without borders as far as electronic commerce is concerned;
- to ensure free movement of information society services between Member States – however, not to harmonize the field of *criminal law* as such;
- to eliminate obstacles that arise from divergences in legislation and from the legal uncertainty as to which national rules apply to the information society services;
- to ensure legal certainty to improve consumer confidence in electronic commerce;
- thus to promote the sales by electronic means.

(1) Directive 2000/31/EC on Electronic Commerce

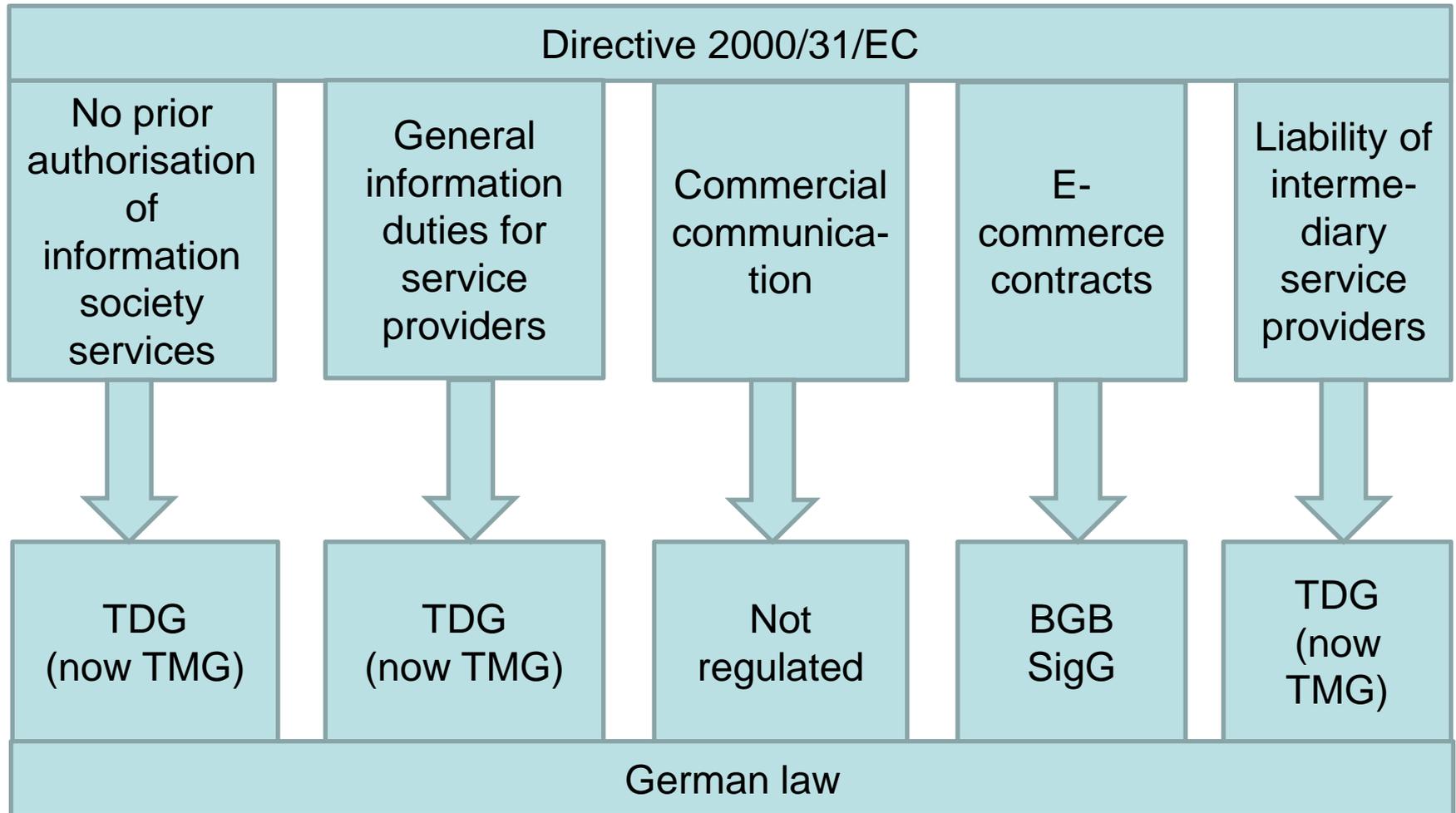
Therefore the Directive provides rules for:

- access to the market for information society service providers (Art. 4 ECD);
- Information duties (Art. 5, 6 ECD);
- Contracts that are concluded by electronic means (Art. 9 – 11 ECD);
- The liability of intermediary service providers (Art. 12 – 15 ECD);
- Out-of-court dispute settlement and court actions (Art. 17, 18 ECD).

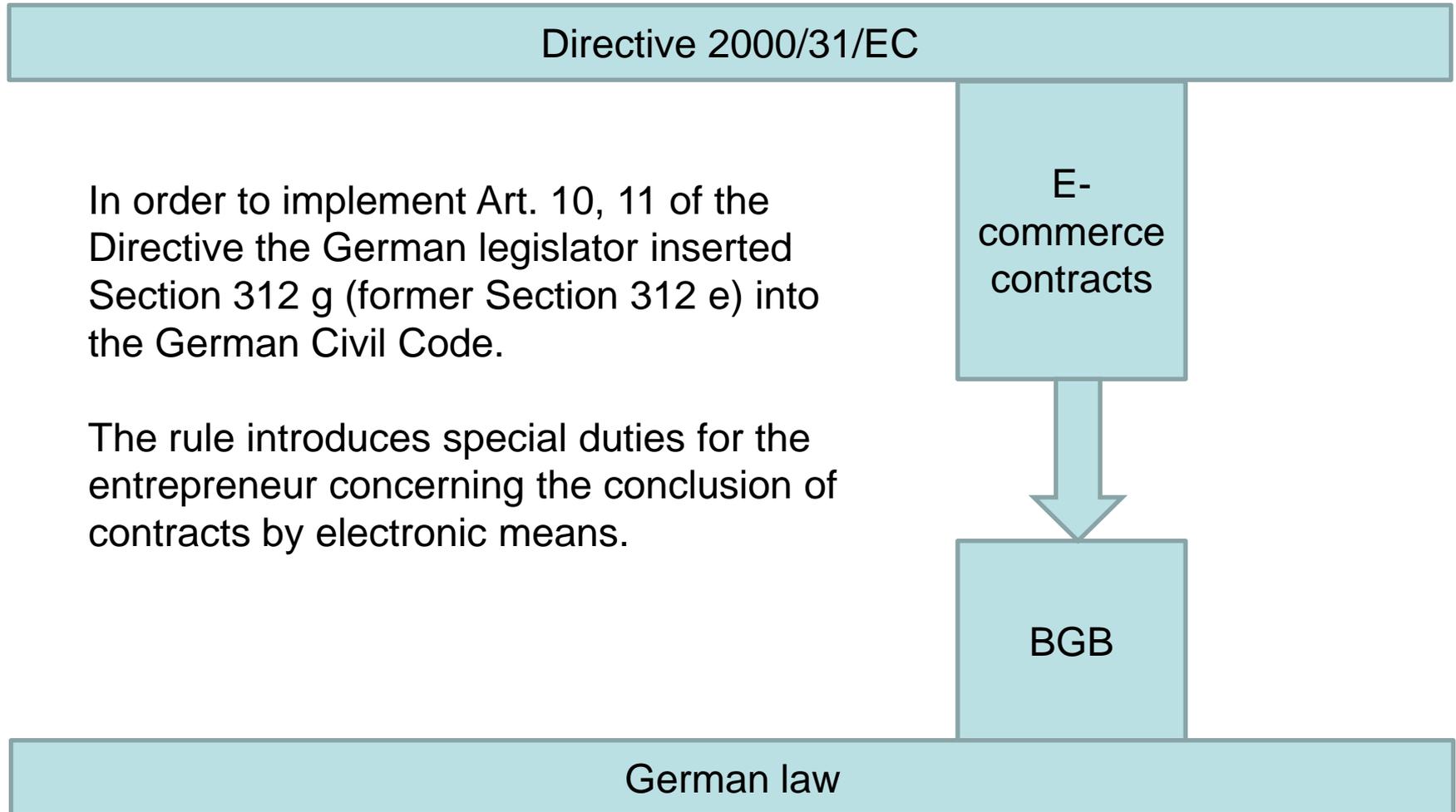
Scope of the Directive



Implementation of the Directive



Implementation of the Directive conc. the E-Commerce Contract



Section 312 g BGB Duties in electronic business dealings

(1) If an entrepreneur uses a tele-service or media service in order to enter into a contract for the supply of goods or the rendering of services (e-commerce contract), he must

- 1. provide the customer with reasonable, effective and accessible technical means with the aid of which the customer may identify and correct input errors prior to the placing of his order,*
- 2. communicate to the customer clearly and comprehensibly of information specified in the statutory order under Article 241 of the Introductory Act to the Civil Code in good time prior to sending his order,*
- 3. confirm receipt of the order without undue delay by electronic means for the customer, and*
- 4. make it possible for the customer to retrieve the contract terms including the standard business terms when the contract is entered into and save them in a form that allows for their reproduction.*

(2) Declaration of Intent over the Internet

Case No. 1:

Two entrepreneurs want to conclude a contract via e-mail. Later on there arises a dispute about the exact moment of the contract's conclusion. One party declares he read the concluding e-mail only on the day after it arrived in his mailbox.

(2) Declaration of Intent over the Internet

Declaration of intent was made



In the presence of the party for whom it was intended.

Requires a possibility of direct communication from person to person

Conceivable for:

- Text-chat
- Video conference

Not in the presence of the party for whom it was intended.

No need of direct communication

e.g.

- E-mail
- Web-page based communication

Effectiveness of a Declaration of Intent

Declaration of intent was made



In the presence of the party for whom it was intended.

The declaration becomes effective when the recipient actually becomes aware thereof (“examination theory”).

Not in the presence of the party for whom it was intended.

The declaration becomes valid upon recipient’s receipt thereof.

§ 130 (1) sentence 1 BGB: *A declaration of intent that is to be made to another becomes effective, if made in his absence, at the point of time when this declaration reaches him.*

Receipt of a Declaration of Intent

A declaration of intent is received when:

1. it is physically within the recipient's sphere of domination and
2. one can expect that the recipient would become aware of it, based on a presumption of normal circumstances.

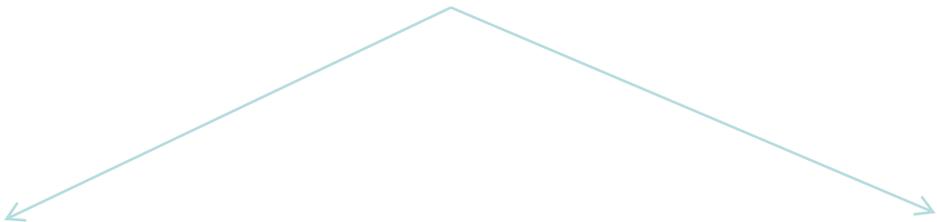
Consequences for e-mail communication

1. An e-mail is physically in the recipient's sphere of domination if it arrives in his/her mailbox or a mailbox system from which the recipient can retrieve it.
 2. Awareness is given when the recipient processes the declaration of intent on the screen.
- It is a different question when the recipient can be expected to become aware of the e-mail.

Receipt of an e-mail

When can the recipient be expected to become aware of an e-mail?

Therefore it is necessary to distinguish two cases:



The declaration was made in the context of a **commercial** transaction

Here you can expect that the entrepreneur will check his mailbox daily during the normal business hours.

Hence receipt is given by the end of the normal business hours at the latest the day the e-mail arrives in the entrepreneur's mailbox.

The declaration was made in the context of a **private** transaction

Here you cannot assume that private individuals will check their incoming e-mail on a daily basis.

Hence receipt is given the day after the e-mail arrives in the private individual's mailbox.

Declaration of Intent over the Internet

Solution of Case No. 1:

Conclusion of the contract was at least at the **end of the normal business hours** on the day the e-mail arrived in the mailbox.

Interpretation of Declarations of Intent

Case No. 2:

An airline passenger uses an airline`s online booking system. Instead of giving the passenger`s name he types “as yet unknown” in the input field concerning first name and surname. The booking system contains the indication that after booking changing the name is impossible. The airline passenger receives the confirmation of booking. To his mind a contract has been concluded.

Interpretation of Declaration of Intent

Solution of Case No. 2:

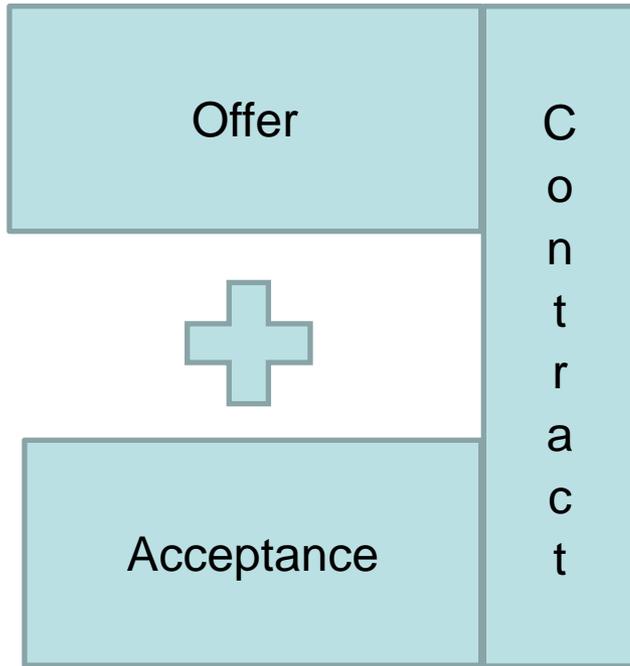
It is the person or company that uses the booking system and not the computer system itself that makes the declaration of intent. Therefore while interpreting declarations of intent one has to consider the human addressee's view. The true intention has to be ascertained and customary practice has to be taken into consideration, Sections 133 and 157 BGB. Hence the confirmation of booking does not constitute the acceptance. The booking system's indication has made clear that the passenger's name is an essential point of the contract. A contract has not been concluded because the parties have not agreed on all points of the contract on which an agreement was required to be reached according to the declaration even of only one party, Section 154 (1) sentence 1 BGB.

(3) Formation of Contracts over the Internet

Case No. 3:

An entrepreneur wants to sell a new vehicle (worth 40.000 €) via internet auction. The closing bid made by a user is about 25.000 €. The entrepreneur declares he cannot accept the customer's offer about 25.000 € but he would agree to sell the vehicle for 37.000 €.

(3) Formation of Contracts over the Internet



- In order to create a contract an offer and an acceptance of this offer are needed.

(3) Formation of Contracts over the Internet



Offer

- If a provider puts goods or services on a website this does not constitute a binding offer to deliver such goods or services.
- The notice of goods and services on a website merely entails an invitation to another person to make a binding offer (*invitatio ad offerendum*).
- Normally the offer is made via the Internet user by clicking the order button.

(3) Formation of Contracts over the Internet



Acceptance

- The concluding declaration of acceptance is made by the entrepreneur.
- Usually the entrepreneur accepts the offer by sending an e-mail.
- It is also possible that the acceptance is implied by shipping the ordered goods to the customer.

(3) Formation of Contracts over the Internet

- According to Section 312 g (1) no. 3 BGB the entrepreneur has the pre-contractual obligation to send a prompt electronic confirmation of receipt of the user's order.
- This doesn't mean that the entrepreneur has to accept or reject the user's offer without undue delay; Section 312 g BGB is not meant to affect the conclusion of the contract.
- The confirmation merely enables the user to receive evidence that he or she made the order and that it was received by the entrepreneur.

Section 312 g BGB Duties in electronic business dealings

(1) If an entrepreneur uses a tele-service or media service in order to enter into a contract for the supply of goods or the rendering of services (e-commerce contract), he must (...)

- 3. confirm receipt of the order without undue delay by electronic means for the customer, and (...)*

(3) Formation of Contracts over the Internet

Solution of Case No. 3:

Contrary to the situation that an entrepreneur notices goods on his website, the German Federal High Court of Justice has decided that the listing of items in an internet auction constitutes a **binding offer** to deliver such goods. The contract will be concluded by the highest bid, which constitutes the acceptance. Hence the entrepreneur is obliged to deliver the vehicle for an amount of 25.000 €.

(4) Validity of Contracts

Case No. 4:

A consumer orders goods in an entrepreneur's web shop. Because of a typing error he orders 100 instead of 10 pieces.

(4) Validity of Contracts

According to Section 119 (1) BGB a person who makes a mistake in his declaration may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.

As a result according to Section 142 (1) BGB the legal transaction is regarded as having been void from the beginning.

Section 119 BGB Voidability for mistake

(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.

Section 142 BGB Effect of avoidance

(1) If a voidable legal transaction is avoided, it is to be regarded as having been void from the outset.

(4) Validity of Contracts

Solution of Case No. 4:

In case 3 the consumer can avoid the declaration because he inadvertently typed “100” instead of “10” pieces.

In reverse the person who declared avoidance has to pay damages to the other party in order to cover the damage that occurs because the other party relies on the validity of the declaration.

Section 122 BGB Liability in damages of the person declaring avoidance

(1) If a declaration of intent is void under section 118, or avoided under sections 119 and 120, the person declaring must, if the declaration was to be made to another person, pay damages to this person, or failing this to any third party, for the damage that the other or the third party suffers as a result of his relying on the validity of the declaration; but not in excess of the total amount of the interest which the other or the third party has in the validity of the declaration.

(4) Validity of Contracts

Solution of Case No. 4:

According to the definition in Section 312 g (1) BGB, the contract in case 3 is an e-commerce contract. Therefore the entrepreneur has to provide the technical means which allow the customer to identify and correct input errors prior to making his order. If the entrepreneur omitted to provide such technical means the enforcement of compensation would be against good faith.

Section 242 BGB Performance in good faith

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

(4) Validity of Contracts

Case No. 5:

A consumer wants to catch up on a certain product in an entrepreneur's web shop. By browsing across the proposals he clicks the "order" button without being aware of it. The entrepreneur insists of payment and delivery. The customer assumes there was no contract concluded.

(4) Validity of Contracts

Solution of Case No. 5:

According to Section 312 g (1) BGB in combination with Art. 246 Section 3 Nr. 1 EGBGB the entrepreneur has to inform the consumer about the different technical steps to follow to conclude the contract.

If he fails to do so it is doubtful whether clicking the order button by the consumer may be considered as a declaration of intent. If not, there is no contract concluded.

However if you assume a declaration of intent the consumer can at least avoid the declaration within the meaning of Section 119 (1) BGB.

As a result the solution follows the one in Case No. 3. Therefore the consumer has not to pay any damages to the entrepreneur.

(5) Incorporation of Standard Business Terms into the Contract

Standard business terms in the B2C (Business to Consumer)-area

According to Section 305 (2) BGB standard business terms become part of a consumer contract if the terms user, when entering into the contract,

1. refers the other party to the contract to them and
2. gives the other party to the contract, in an acceptable manner, the opportunity to take notice of their contents, and
3. if the other party of the contract agrees to their applying.

(5) Incorporation of Standard Business Terms into the Contract

Standard business terms in the B2C-area

Reference:

This might be

- an icon or
- an hyperlink

in the order form which relegates to the business standard terms. Not sufficient is the mere mention of the business standard terms on the main page of the website or a hidden hint on the margin of the order form.

Opportunity to take notice:

It is sufficient that the consumer is able to read the terms on his screen and has the possibility to save them.

(5) Incorporation of Standard Business Terms into the Contract

Standard business terms in the B2B-area

In the B2B-area solely a hint by the terms user and the agreement of the other party of the contract are required for the incorporation of standard business terms into the contract.

(5) Incorporation of Standard Business Terms into the Contract

Modifications for e-commerce contracts

Section 312 g (1) BGB calls the other party of the contract “customer”. This term includes both consumers and entrepreneurs. Hence the entrepreneur has to fulfill his duties concerning e-commerce contracts towards consumers as well as to other entrepreneurs.

Pursuant to Section 312 g (1) no. 4 BGB the customer must have the possibility

- to retrieve the standard business terms when the contract is entered into,
and
- to save them in a form that allows their reproduction.

§ 312g BGB Duties in electronic business dealings

(1) If an entrepreneur uses a tele-service or media service in order to enter into a contract for the supply of goods or the rendering of services (e-commerce contract), he must

- 4. make it possible for the customer to retrieve the contract terms including the standard business terms when the contract is entered into and save them in a form that allows for their reproduction.*

(5) Incorporation of Standard Business Terms into the Contract

Modifications for e-commerce contracts

In the context of e-commerce contracts exceeding to § 305 (2) BGB even the interested entrepreneur must have the opportunity to take notice of the standard business terms contents when entering into the contract.

This is due to the fact that in e-commerce it could be difficult to receive evidence about whether and, if so, which version of standard business terms became part of the contract. This difficulties apply to both consumers and entrepreneurs.

Section 312g BGB Duties in electronic business dealings

(1) If an entrepreneur uses a teleservice or media service in order to enter into a contract for the supply of goods or the rendering of services (e-commerce contract), he must (...)

- 4. make it possible for the customer to retrieve the contract terms including the standard business terms when the contract is entered into and save them in a form that allows for their reproduction.*

(6) Standard Business Terms and Data Privacy

Case No. 6

A consumer wants to sign in on Facebook. The sign in form says:

“With your registration you will accept our standard business terms and our privacy policy (>>Datenschutzerklärung<<).”

Both standard business terms and privacy policy are arranged as hyperlinks which relegating to a text box containing a set of regulations. Thereby the privacy policy contains rules for the use and distribution of personal information of the consumer.

(6) Standard Business Terms and Data Privacy

Solution of Case No. 6

Intention of the privacy policy is to get the agreement of the consumer in using his or her personal information for commercial purposes.

Despite of the separation of the “standard business terms” on the one hand and “privacy policy” on the other hand there is no doubt that the privacy policy constitutes **standard business terms**.

(6) Standard Business Terms and Data Privacy

Solution of Case No. 6

As mentioned above the German Civil Code provides special rules for the incorporation of standard business terms into a consumer-contract in Sections 305 seq. BGB.

The expression “privacy policy” (>>Datenschutzerklärung<<) implies that the set of regulation deals with ensuring the information of the consumer. An average consumer will not understand that the regulations in fact govern the **commercial use of the consumer’s personal information.**

Hence the privacy policy is not a declaration of the enterprise to protect the consumer’s personal information but rather a declaration by the consumer accepting the use and distribution of his or her data.

(6) Standard Business Terms and Data Privacy

Solution of Case No. 6

One may think that such wording is surprisingly. According to Section 305c (1) BGB a clause in standard business terms that is **surprising** does not become part of the contract.

Consequently there would be no legal basis in using and distributing the consumer's personal information.

Section 305c BGB *Surprising and ambiguous clauses*

(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract.

(6) Standard Business Terms and Data Privacy

Solution of Case No. 6

However even if the privacy policy became part of the contract it may be ineffective because it unreasonably disadvantage the consumer. According to Section 307 (1) sentence 2 BGB the disadvantage could arise from the contradictory designation of the declaration of the consumer as a “privacy policy” (>>Datenschutzerklärung<<).

Here, too, there would be no legal basis for using and distributing the consumer’s personal information.

Section 307 BGB Test of reasonableness of contents

(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

(7) Form Issues

Written form and internet

Generally legal transactions do not require a form. However for certain transactions the **written form** is prescribed by statute. If so the document must be signed by the issuer with his name in his own hand.

If the written form is prescribed for a contract both parties must sign on the same document or at least each party has to sign the document that is intended for the other party.

To make formal requirements suitable with e-commerce Section 126 (3) BGB determinates that written form may be replaced by electronic form, unless the statute leads to a different conclusion.

Section 126 BGB Written form

(...)
(3) *Written form may be replaced by electronic form, unless the statute leads to a different conclusion.*

(7) Form Issues

Electronic form

In order to match the “electronic form” the issuer must provide the electronic document with a qualified electronic signature.

For contracts a **qualified electronic signature** on each document is required to meet the requirements.

Due to the fact that you cannot physically see the counterpart when concluding over the internet the electronic signature will guarantee that the declaration is really made by the person from whom it appears to be.

Section 126a BGB Electronic form

(1) If electronic form is to replace the written form prescribed by law, the issuer of the declaration must add his name to it and provide the electronic document with a qualified electronic signature in accordance with the Electronic Signature Act [Signaturgesetz].

(2) In the case of a contract, the parties must each provide a counterpart with an electronic signature as described in subsection (1).

(7) Form Issues

Electronic form and suretyship

In order to avoid a hasty decision by the obligated party Section 766 sentence 1 BGB provide that the declaration of suretyship must be issued in writing. According to sentence 2 of Section 766 BGB it is not sufficient to make the declaration in electronic form.

This rule contradicts Art. 9 (2) lit. (c) of the e-commerce directive, where the conclusion of contracts of suretyship by electronic means may only be restricted when persons are acting for purposes outside their trade, business or profession.

Section 766 BGB *Written form of the declaration of suretyship*

For the contract of suretyship to be valid, the declaration of suretyship must be issued in writing. The declaration of suretyship may not be made in electronic form. If the surety discharges the main obligation, the defect of form is remedied.

(7) Form Issues

Electronic form and suretyship

The contradiction is only partially limited by the fact that the German Commercial Code permits the electronic form for the declaration of suretyship in Section 350 HGB, as this rule applies solely if for the obliged party the suretyship is a commercial transaction.

(8) Latest decisions of the Court of Justice of the European Union concerning Directive 2000/31/EC

(1) L'Oréal vs eBay: C-324/09 (12 July 2011)

The Court of Justice of the European Union has given judgment in the long standing dispute between L'Oréal (and various subsidiaries) and eBay (and some of the sellers on eBay), concerning the sale, without L'Oréal's consent, of L'Oréal products on the online marketplace operated by eBay.

Main contents of the ruling:

- The EU trade mark rules apply to offers and advertisements that are targeted at consumers in the EU
- The operator of an internet marketplace does not itself 'use' trade marks
- The operator may be liable in particular (but not only) if it plays an 'active role' of such kind as to give it knowledge of, or control over, the data relating to the offers for sale (in particular by providing assistance with the presentation)
- The operator may have to make it easier to identify the sellers.

(8) Latest decisions of the Court of Justice of the European Union concerning Directive 2000/31/EC

2) Scarlet vs SABAM: C-70/10 (24 November 2011)

Main contents of the ruling:

- Holders of intellectual-property rights may apply for an injunction against intermediaries whose services are being used by a third party to infringe their rights
- EU law precludes the imposition of an injunction by a national court which requires an internet service provider to install a filtering system with a view to preventing the illegal downloading of files.

(9) Summary

- (1) E-commerce is largely governed by the E-commerce-Directive (2000/31/EC), that mainly aims at facilitating the internal market.
- (2) At the same time in general the traditional rules on issuing and receipt of a declaration of intent and on the formation of contract still are applicable, with a few modifications that notably concern the binding effect of a presentation of goods or services in the Internet.
- (3) The entrepreneur has to provide the means to identify and correct errors.
- (4) In the B2C area there are stricter requirements for the incorporation of Standard Business Terms than is the case for B2B. However, for any customer in electronic business dealings it must be possible to save the document.
- (5) Data privacy rules may be surprising and thus invalid (Section 305c BGB)
- (6) As to form requirements some of the traditional rules, e.g. those concerning suretyships, still have to be adopted to the Directive.

Thank you for your attention!