

GETTING THE DEAL THROUGH

# e-Commerce

in 31 jurisdictions worldwide

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# Austria

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## General

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

Within the EU, Austria is the number one in e-government. The country has very few obstacles to e-commerce. The last information and communication technologies (ICT) usage survey offers some interesting figures regarding business and customers: more than 97 per cent of Austrian businesses with more than nine employees use computers and the internet; 45 per cent of internet users use the internet to handle their financial affairs.

Generally, the same rules apply to offline commerce and online e-commerce. Nevertheless, there are still some areas that discriminate against the use of the internet, for example, formal requirements for some contracts or invoices or where special information requirements are stipulated due to the distance between business and customer.

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## Legislation

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

Austria has implemented the relevant EU Directives (on e-commerce, distance contracts, distance marketing of financial services, electronic signatures, etc). Furthermore, the Media Act, the Code of Business Law and the Trade Act were recently amended to adapt them to the internet and now make greater provision for the internet, especially regarding information duties. In general, legal rules applying to the offline world similarly apply to the online world.

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## Regulatory bodies

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

There are no specific regulatory bodies responsible for the regulation of e-commerce in Austria. Internet access tariffs and charges are covered by the Telecommunications Act. Article 25 of the Telecommunications Act obliges service providers to notify their terms of trade and access tariffs and charges to the Telecom Control Commission.

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## 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?

Regarding business-to-business (B2B) or business-to-consumer (B2C) contracts, jurisdiction is governed by the rules of Council Regulation 44/2001 et al, if applicable, otherwise by genuine national law. The applicable law is determined by the Rome Convention 1980.

According to both the Council Regulation and the Rome Convention 1980, the proper jurisdiction and the applicable law for contractual matters is generally that of the place of performance of a contractual obligation. This is often the place of business of the party performing the obligation (eg, delivering the goods). Agreements conferring jurisdiction and choice of law clauses are permitted under these Acts, and can be stipulated over the internet without electronic signature. However, there are some exceptions, such as where consumers are subject to special protection. In practice this means that in the majority of cases, Austrian jurisdiction will be mandatory and Austrian law will be applicable.

If Council Regulation 44/2001 et al is not applicable (eg, for contracts with non-EU and EFTA member states), agreements conferring jurisdiction have to be signed by both parties.

In relation to tortious acts such as unfair competition, the marketplace principle is used to determine jurisdiction. This corresponds to the Rome II Regulation 864/2007 that shall apply from 11 January 2009.

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## 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?

It is possible for most contracts, with the exception of those that call for special form requirements (eg, legalisation, deeds), to be formed and concluded electronically. According to the Austrian Civil Code, contracts are generally concluded upon an offer being accepted. Written form is not mandatory for most contracts. Where written form is mandatory, the contract must be executed with an electronic signature. See question 4 regarding jurisdiction and applicable law.

Click wrap contracts are principally enforceable under Austrian law since no special formal requirements have to be fulfilled. However, by the time the party clicks 'I agree', the party must either be aware of the relevant contractual terms or must have been at least given the possibility to take notice of them. This is particularly important for the validity of general terms and conditions or licence agreements; they will not be effective unless the party agrees to them before the purchase.

Following the definitions of the Civil Code, donations are contracts as well.

For contracts concluded via e-mail, a recent judgment determined that the burden of proof regarding receipt of an e-mail lies upon the sender. The court stated that an e-mail sending protocol is no adequate proof. To avoid difficulties of proof, it is recommended to insist on an explicit confirmation of receipt in writing.

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

The E-Commerce Act defines the information obligations to be met by the service provider as stipulated in the EC Directive. Electronic contractual declarations, other legally significant electronic declarations and electronic confirmations of receipt are considered to be duly received if the party for whom they are intended can retrieve them in normal circumstances. This provision may not be rescinded to the disadvantage of consumers.

On websites and newsletters, service providers have to post at least the following information:

- the name of the service provider;
- the geographic address at which the service provider is established;
- the details of the service provider, including its e-mail address, which allows it to be contacted rapidly and communicated with in a direct and effective manner;
- when the service provider is registered in a trade or similar public register, the name of such trade register and the service provider's registration number or equivalent means of identification in such register;
- if the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- for the regulated professions only: any professional body or similar institution with which the service provider is registered, the professional title and the EU member state where it has been granted, a reference to the applicable professional rules in the member state of establishment and the means to access them; and
- if applicable, the VAT number.

Online shops have to satisfy further requirements (except when otherwise agreed by parties who are not consumers). At least the following additional information has to be provided in a clear, comprehensive and unambiguous way and prior to the order being placed by the recipient of the service:

- the different technical steps to follow to declare and conclude the contract;
- whether or not the text of the contract will be stored by the service provider after the conclusion thereof and, if relevant, information on means of accessing such contractual text;
- the technical means for detecting and correcting input errors prior to declaring the contract;
- the languages in which the contract may be concluded; and
- any voluntary codes of conduct to which the service provider subscribes.

When or after placing the order, as appropriate, users must be given effective and accessible technical means to allow them to identify and correct input errors before issuing any contractual declaration; obtain immediate confirmation by electronic means of the receipt of the electronic contractual declaration; and be provided with contractual provisions and general terms and conditions of business in such manner that the user may store and reproduce them.

Whereas the E-Commerce Act is applicable to businesses and customers, the Consumer Protection Act only applies to consumers and foresees a range of rules for distance contracts (eg, withdrawal rights and information duties which are similar to those of the E-Commerce Act).

The Media Act is generally applicable to newsletters and websites, for example, the provisions on indemnity claims because of defamation, libel, slander, insult and ridicule or on violation of the strictly personal sphere. Furthermore, the Act obliges the media owner to

provide certain information depending on the type of media. Newsletters that are published at least four times a year must indicate the name or the company as well as the address of the media owner and publisher. On websites containing no information beyond the media owner's presentation of him or herself or his or her personal life-style, to the extent such presentation is not likely to influence public opinion, only the name or the company, where possible the object of the business and the domicile or registered address of the media owner need to be indicated. If the website influences public opinion, the following information has to be given: name or company name, including the object of the company, domicile, place of business or branch office, type and amount of the equity share holding of the media owner and, in the case of a company or an association, the executive officers, the members of the management board and of the supervisory board as well as all shareholders whose share or nominal capital exceeds 25 per cent. If a company is a shareholder, the shareholders of such company need to be listed as well. Where an indirect share exceeds 50 per cent, such indirect shareholder must also be named.

Consequent to the implementation of the EU Directive on disclosure requirements, the Code of Business Law and the Trade Act were recently amended to adapt existing rules to the internet age, especially electronic documents. The laws contain nearly identical provisions regarding particulars in business letters and order forms as well as websites: their media owners need to state the name, legal form, registered office, commercial register number and court; if the company is in liquidation, a note to this effect needs to be added. Additional information duties are imposed on sole traders, cooperatives, private and public limited companies and branches of foreign companies. For e-mails, these particulars need to be integrated into the e-mail signature. An attachment to the e-mail or link to the website does not fulfil the legal requirements. Due to an editorial error in the transitional provisions in the amendments to the above-mentioned laws, compliance has been mandatory for all companies regarding e-mail, but only for private and public limited companies regarding websites since 1 January 2007. Partnerships, sole traders, etc, have to comply with the website rules from 1 January 2010.

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

Consequent to Austria implementing the EU Directive on electronic signatures, electronic documents with a 'secure electronic signature' (advanced electronic signature based on a qualified certificate and created by a secure signature creation device) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data. Since January 2007, paper and electronic documents explicitly have the same level of authenticity in civil proceedings.

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

Several laws prescribe an obligation on businesses to retain records, either physically or in electronic form, for at least seven years for tax, auditing, accounting and social security reasons. If stored electronically, the business has to provide the necessary technical requirements enabling the authorities to process the data in the case of an inspection or tax audit. The EU Directive 2006/24 on data retention in public electronic communication is relevant, too, but has not yet been implemented in Austria, although the time limit for implementation expired in September 2007.

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**Security**

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

According to the provisions of the Data Protection Act, every data controller and processor must take reasonable technical and organisational measures to secure personal data against unlawful use and loss or destruction. Furthermore, the Telecommunications Act contains special duties for ISPs (providers of telecommunications networks or services), obliging them to secure their networks and services, as well as safeguard the interests of their subscribers and users with regard to their personal data. These measures must guarantee an appropriate level of security, in proportion to the risk, taking into account the state of technology and the costs.

- 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?

The use of encryption is generally allowed. Existing legislation, such as the Security Police Act or the Code of Criminal Procedure, provide an adequate legal basis for access to private keys, either through questioning somebody who knows the key as a witness or by confiscating data carriers that contain the key. Certification authorities are permitted and liability is regulated in accordance with the EU Directive on electronic signatures.

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**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 entity responsible for the allocation of domain names with country top-level domains '.at' and the second-level domains 'ac.at' and 'or.at' is NIC.AT. Domain names are allocated on a first come, first served basis. Residency in Austria is not necessary but a postal address (not necessarily in Austria) where official documents (eg, summons) can be served is required. Arbitration on the basis of the WIPO alternative dispute resolution or the National Arbitration Office for '.at' domains is possible but not mandatory.

- 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?

Domain names do not confer any additional rights beyond the rights which naturally vest in the domain name. Use of a domain name during a certain period may, however, constitute a non-registered trademark.

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

Ownership of a trademark will assist in challenging a 'pirate' registration of a similar domain name. In the case of domain grabbing, trademarks are not even necessary.

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**Advertising**

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

Advertising on the internet is not subject to taxation. Spamming is forbidden under the Telecommunications Act, which follows an opt-in system, with an exemption for opt out regarding own

customers. Furthermore, the Media Act prescribes some relevant duties concerning advertising, namely, information on the sender of newsletters and provider of websites has to be given (see question 6) and announcements, recommendations and other features and reports for whose publication a payment is received must be identified in periodically published media (ie, websites and newsletters disseminated in a comparable way at least four times per year) as advertisements, paid insertion or advertising, unless their design or arrangement excludes any doubts that the publication has been made in return for payment.

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

Extensive legislation exists on goods and types of content subject either to a total ban on advertising or a ban on catalogue advertising (which includes the internet), thus limiting, inter alia, advertising of tobacco, alcohol and medicinal products. Certain professions such as lawyers, doctors, undertakers, etc are subject to advertising restrictions. Some content is illegal, for example, child pornography or Nazi propaganda.

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**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?

The selling of financial services is regulated by the Act implementing the EU Directive governing distance marketing of consumer financial services. The Act merely contains a long list of information duties regarding distribution, telephone sales, contract terms and the consumer's right to rescind the basic contract in specified cases.

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**Defamation**

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

ISPs can be held liable for content under civil and criminal law. According to the E-Commerce Act implementing the E-Commerce Directive, ISPs are not obliged to monitor host and access services. Access providers are, as a rule, exempted from liability if they have no connection with the content (eg, initiation of the transmission). Host providers are exempted from liability unless they are aware of the infringement. This rule does not impede injunctive relief and, according to a decision by the Austrian Supreme Court, a host provider is obliged to monitor any host site where an infringement has occurred and further infringements may be expected.

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

ISPs can contract with their customers that they have a right to shut down a web page upon first suspicion. Apart from this, according to the E-Commerce Directive, an ISP loses its 'liability exemption' mentioned in question 17 when it has actual knowledge of any illegal activity or information and, as regards claims for damages, is aware of facts or circumstances pointing to any illegal activity or information or, upon obtaining such knowledge or awareness, fails to remove or disable access to this information.

**Intellectual property**

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

A website provider can link to third-party websites without permission. Even copyrighted content can be linked as long as the copyright of the third party is clear. Therefore, such content should not be linked through framing.

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

The same rules apply online as well as offline. It is forbidden to use any content protected by intellectual property rights (eg, copyright) without permission.

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

If the website provider has an exclusive licence for the software, it is allowed to exploit the software. Otherwise, it will need prior permission from the copyright owner.

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

Unlike the E-Commerce Directive, the E-Commerce Act contains special rules that exempt linking from liability in the following cases: the 'linker' does not have actual knowledge of any illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or, upon obtaining such knowledge or awareness, acts expeditiously to remove the electronic link.

**Data protection and privacy**

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

According to the Data Protection Act, personal data is defined as information relating to data subjects (a concept that includes legal persons, ie, enterprises) who or which are identified or identifiable.

**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?

A data controller has to notify data applications containing personal data to the Data Protection Authority, unless it falls under an exemption listed in the Standard Applications Ordinance. The exemption is made for relatively simple and frequently occurring data applications, such as processing of human resources and customer data, including for marketing purposes.

Data brokering is reserved for businesses that have a special trade licence that covers the selling of specific data without the consent of the data subject, such as name, gender, title, academic degree, address, date of birth or company name. No other business is allowed to sell customer data without the data subject's consent.

**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 legislation exists on this topic, but such action could trigger a registration duty as mentioned in question 24 and might require customer consent if personal data is processed.

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

Hosting is data committing, which under the Data Protection Act is allowed without many limitations. One of these limitations is trans-border data flow outside the EU which is subject to an authorisation by the Data Protection Authority, unless an exemption applies, for example, committing to a US-based company that signed the safe harbour agreement.

**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, such as VAT.

**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?

As a rule, the state where a business is established has the right to tax the entire profit, regardless of where this profit was generated. At the same time, the state in which the profit was generated may also levy taxes. Consequently, profit can be double taxed. To avoid this, many states have double taxation treaties. The condition for sharing the 'tax rights' is that the business has a 'permanent establishment' in the non-residence country. The issue is whether the server's geographical location can be assessed as a permanent establishment according to the OECD model convention. The Austrian Ministry of Finance considers that a server is a permanent establishment when used exclusively by the company. The OECD Commentary on article 5, at 42.1 to 42.10, propounds a different view: the server does not constitute a permanent establishment if its function is a mere auxiliary or preparatory one (such as providing communication links, advertising, gathering market data, and supplying information).

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

A company needs a VAT number to export goods tax free into the EU. Such numbers are issued by the tax authorities. Domestic internet sales are subject to the same tax regulations as offline sales.

**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?

Not applicable.

**Gambling**

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

Bets which are not characterised as hazardous (especially sports betting) do not infringe the gambling monopoly of the Austrian state, but are subject to a permit. Lotteries need an authorisation from the Ministry of Finance. Gambling for low stakes may be allowed by state law.

**Update and trends**

Electronic business-to-business billing is currently not very common, due to the mandatory use of a secure electronic signature. Therefore, the Ministry of Finance is in negotiations with stakeholders in order to facilitate electronic billing, for example, by banning electronic signatures.

A draft for an amendment of the Austrian Data Protection Act was presented in March 2008. It, inter alia, provides for the abolishment of the protection of legal persons' personal data, which was rejected by important stakeholders such as the Federal Bar Association and the Federal Economic Chamber. However, the draft has not yet been withdrawn and discussions are still in course.

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

Online casinos and their use are forbidden. Betting websites are allowed. Permits for sports bets are issued by the state governments. Generally, participants have to be over 18 (age requirements are regulated by state law).

**Outsourcing**

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

The Data Protection Act allows outsourcing but requires a written contract with certain content. In the case of outsourcing outside the EU or to a non-exempted country or business (eg, safe harbour in the USA), the data commitment is subject to a permit by the data protection authorities. The application for such a permit should outline the existence of an adequate level of data protection for committing. This is then to be judged considering all circumstances relevant to the use of data, such as the type of data used, the purpose and duration of use, the country of origin and final destination, as well as the general and sectoral legal provisions, professional rules and security standards applying in the third country. Otherwise, the controller could try to demonstrate that the data subject's interest in secrecy of the planned data exchange will be respected outside Austria by other means. In particular, contractual guarantees regarding the use of data given by the recipient to the applicant are significant for the decision. In practice, the Standard Contractual Clauses for Processors (adopted by the European Commission) are used to demonstrate the existence of an adequate level of protection.

**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?

In the majority of cases, the rules of transfer of businesses are applicable. Thus, all employees as well as their rights and obligations will automatically be transferred with the business. Within a one-month period, an employee may object to the transfer and remain with the previous employer. If the conditions of employment worsen because of applicable collective bargaining agreements, the employee is entitled to cancel the contract within a month after such deterioration was identifiable. In such a case, the employee enjoys the same rights that are due when the employer has cancelled the contract. The previous and the new employer are jointly liable for all obligations based on the period before the transfer, except for dismissal payments, for which they are liable for five years after the transfer.

**Online publishing**

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

Liability depends on who gives the information. If a content provider gives wrong information about somebody, it may be held liable under the conditions of the Media Act, which does not require fault. Furthermore, the provider may be committed to publish a counter-statement.

In the absence of a contract, liability cannot be limited for publications, thus making such clauses on websites irrelevant. According to the Civil Code, however, persons announcing publicly that they are experts are liable for their area of expertise.

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

Austria implemented the relevant EU Database Directive protecting databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual copyright and thereby create a sui generis right when the database shows that there has been qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents, to prevent extraction or re-utilisation of the whole or of a substantial part evaluated qualitatively or quantitatively, of the contents of that database.

If the database is protected by copyright, the creator has all the rights usually linked to copyright (eg, temporary or permanent reproduction by any means and in any form, in whole or in part; translation, adaptation, arrangement and any other alteration; any form of distribution to the public of the database). If the database is protected by the sui generis right, the creator of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting or re-utilising insubstantial parts of its contents, evaluated qualitatively or quantitatively, for any purposes whatsoever. The extraction of even substantial parts is lawful in the case of extraction for private purposes of the contents of a non-electronic database; in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; in the case of extraction or re-utilisation for the purposes of public security or an administrative or judicial procedure.