

## **Act 34/2002 of 11 July on Information Society Services and Electronic Commerce<sup>1</sup>.**

### **Article 1. Object.**

1. It is the object of this Act to regulate the legal framework for information society services and electronic contracting insofar as concerns the obligations of service providers, including service providers who act as middlemen in the transmission of contents by telecommunications networks, electronic commercial communications, information before and after the conclusion of electronic contracts, conditions regarding the validity and efficacy of electronic contracts and the system of sanctions applicable to information society service providers.

2. The provisions herein shall be held to be without prejudice to the terms of other State or regional autonomous rules that lie outside the coordinated legislative sphere or whose finality is to protect health and public security, including the safeguarding of national defence, consumer interests, the tax procedure applicable to information society services, personal data protection and the rules regulating competition defence.

(...)

## **CHAPTER II Sphere of application**

### **Article 2. Service providers established in Spain.**

1. This Act shall be applicable to information society service providers established in Spain and to the services they deliver.

A service provider shall be understood to be established in Spain when the residence or registered offices of the provider lie on Spanish soil, provided that the said residence or registered offices coincide with the place where the administration and management of the provider's business are in fact centralised. Otherwise the place where the said administration or management is conducted shall be used.

2. Furthermore, this Act shall be applicable to information society services that providers residing in or having registered offices in another State offer through a permanent establishment situated in Spain.

It shall be considered that a provider operates through a permanent establishment situated on Spanish soil when the provider has there, in an ongoing or habitual fashion, facilities or workplaces where all or part of the provider's activity is performed.

3. For the purposes of this article, it shall be presumed that the service provider is established in Spain when the provider or one of its branch offices is registered in the Mercantile Registry or another Spanish public registry where registration is necessary for the acquisition of legal standing.

The use of technological facilities located in Spain for the delivery of or access to service shall not serve as criteria for determining, on that basis alone, that the provider has an establishment in Spain.

4. Information society service providers who are established in Spain shall be subject to all other provisions of Spanish law that are applicable to them, depending

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<sup>1</sup> This text is an unofficial translation with no legal value. The only binding text is the one published in the *Boletín Oficial del Estado*, 166, on 12 July 2002.

upon the activity they perform, regardless of the use of electronic means for the performance of the said activity.

**Article 3. Service providers established in another Member State of the European Union or the European Economic Space.**

1. Without prejudice of the terms of articles 7.1 and 8, this Act shall be applied to information society service providers who are established in another Member State of the European Union or the European Economic Space when the recipient of the services is situated in Spain and the services involve the following matters:

- a) Intellectual or industrial property rights.
- b) The release of publicity by portfolio investment institutions.
- c) Direct insurance business done under the framework of freedom of establishment or under the framework of freedom to provide services.
- d) Obligations stemming from contracts concluded by individuals in their capacity as consumers.
- e) The procedure whereby the contracting parties may choose the legislation applicable to their contract.
- f) The legality of unsolicited commercial communications sent by electronic mail or another equivalent means of electronic communication.

2. At all events, the creation, transfer, modification and termination of real rights to immovable property located in Spain shall be subject to the formal requirements set by Spanish law for validity and efficacy.

3. The service providers to which paragraph 1 refers shall likewise be subject to the rules of Spanish law that regulate the matters indicated in the said paragraph.

4. The terms of the paragraphs above shall not be applicable to cases where, in accordance with the rules regulating the matters enumerated in paragraph 1, the law of the country where the recipient of the service resides or is established is not applicable.

**Article 4. Providers established in a State not belonging to the European Union or the European Economic Space.**

The terms of articles 7.2 and 8 shall be applied to providers established in countries that are not members of the European Union or the European Economic Space.

Providers who address their services specifically towards Spain shall furthermore be subject to the obligations set down herein, provided that the terms of the applicable international treaties and conventions are not thus contravened.

(...)

**Article 5. Services excluded from the sphere of application of the Act.**

1. The following information society activities and services shall be governed by their own specific rules:

- a) Services rendered by notaries and land and mercantile registrars in the exercise of their respective public functions.

b) Services rendered by attorneys and *procurators litis* in the exercise of their functions of representing and defending their principals in legal proceedings.

2. The provisions of this Act, with the exception of the terms established in article 7.1, shall be applicable to information society services regarding games of chance that involve bets having economic value, without prejudice of the terms established in their specific State or regional autonomous legislation.

(...)

**Article 12. Duty to hold traffic data relating to electronic communications.**

1. The operators of electronic communications networks and services, the providers of access to telecommunications networks and the providers of data housing services must hold for a maximum of twelve months the connection and traffic data generated by the communications established during the delivery of an information society service, under the terms established in this article and the regulations implementing this article.

2. The data that, in compliance with the provisions of the paragraph above, the operators of electronic communications networks and services and the providers of access to telecommunications networks must keep shall be only those data necessary to facilitate the location of the terminal equipment employed by the user to transmit the information.

The providers of data housing services must hold only those data that are vital for identifying the origin of the housed data and the time when the delivery of the service began.

In no case shall the obligation to hold data affect the secrecy of communications.

The operators of electronic communications networks and services and the service providers to which this article refers may not use the data held hereunder for purposes other than those indicated in the paragraph below or other purposes permitted by the Act and must take appropriate security measures to avoid the loss or alteration of such data and unauthorised access to such data.

3. Data shall be kept for use in the process of a criminal investigation or for the safeguarding of public security and national defence, placed at the disposal of the courts or tribunals or public prosecutor who requires the data for that purpose. Communication of these data to security forces and corps shall be done subject to the provisions of personal data protection rules.

4. The categories of data that must be kept according to the type of service rendered, the time during which the data must be kept in each case within the maximum time set in this article, the conditions under which the data must be stored, processed and guarded and the fashion in which, where appropriate, the data must be delivered to the bodies authorised to request them and destroyed after having been held for the proper time, save where necessary for these or other purposes provided for in the Act, shall be determined by regulation.

(...)

TITLE III

**Electronic commercial communications**

(...)

**Article 21. Prohibition of unsolicited commercial communications done through electronic mail or equivalent means of electronic communication.**

1. It is prohibited to send advertising or promotional communications by electronic mail or another equivalent means of electronic communication when not solicited or expressly authorised in advance by the recipient of the communications.

2. The provisions of the paragraph above shall not be applicable when there is a prior contractual relation, provided that the provider shall have legally obtained the contact details of the recipient and used them to send commercial communications referring to products or services of its company that are similar to those initially at issue in the contract between provider and customer.

At all events, the provider must offer the recipient the opportunity to object, free of charge and in an easy manner, to the processing of his data for promotional purposes, both at the time the data are collected and on the occasion of each commercial message addressed to the recipient.

**Article 22. Rights of service recipients.**

1. The recipient may revoke at any time his consent to receive commercial communications by merely notifying the sender of his wishes.

To that end, service providers must provide service recipients with simple means free of charge whereby to revoke their consent.

Furthermore they must facilitate electronically accessible information about the said means.

2. When service providers employ devices for the storage and recovery of data from terminal equipment, they shall inform recipients of the use and finality of such devices in a clear and comprehensive manner, offering recipients the opportunity to refuse, by a simple means and free of charge, to allow their data to be processed.

This shall not prevent any storage of or access to data for the purpose of carrying out or technically facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the recipient.

(...)

**Article 38. Infractions.**

1. Infractions of this Act shall be classified as very serious, serious or minor.

(...)

3. The following are serious infractions:

(...)

c) The mass sending of commercial communications by electronic mail or another equivalent means of electronic communication or the sending, in the space of one year, of more than three commercial communications by the means alluded to, to a single recipient, when the said sending fails to meet the requirements established in article 21.

d) Significant breach of the obligation of the service provider established in article 22.1, in relationship with the procedures for revoking consent given by recipients.

(...)

i) Significant breach of the obligations to inform or to establish a procedure for refusing data processing, established in article 22.2.

4. The following are minor infractions:

(...)

c) Failure to comply with article 20 for commercial communications, promotional offers and contests.

d) The sending of commercial communications by electronic mail or another equivalent means of electronic communication when the said sending fails to meet the requirements established in article 21 and does not constitute a serious infraction.

(...)

h) Breach of the obligation of the service provider established in article 22.1, in relationship with the procedures for revoking consent given by recipients when the breach does not constitute a serious infraction.

(...)

**Article 43. Sanctioning powers.**

(...)

Furthermore it shall be the task of the Agencia de Protección de Datos (Data Protection Agency) to impose sanctions for the commission of the infractions listed in articles 38.3 c), d) and i) and 38.4 d), g) and h) hereof.