Proactive ICT Law in the Nordic Countries

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1 INTRODUCTION

1.1 THE THEME

This contribution is devoted to the development of proactive ICT\(^1\) law in the Nordic countries.\(^2\) Briefly put, *proactive law* may be described as an approach which comprises a way of legal thinking combined with a set of skills, practices and procedures that help organizations and individuals to identify opportunities in time to take advantage of them, and to spot potential problems while preventive action is still possible. This legal method represents a future-oriented approach to law, based on the view that legal knowledge is at its best when applied before things go wrong.

It should be clarified right from the beginning that *the notion of 'law'* here is not equivalent to rules and regulations, but refers instead to law as an instrument that can be shaped in a whole variety of ways, e.g. as a basis for legal risk analyses, legal system design and management.

Furthermore, it should be emphasized that the issue here is not at all to present proactive aspects of law as something new and original as such. On the contrary, it is a well-known fact that law conventionally may function as both a *proactive* and *reactive steering mechanism*. Legal rules and regulations, contracts of different kinds, institutions for dispute resolutions may, for instance, both prevent conflicts and support problem-solving retrospectively.

In addition to the fact that lawyers so to speak always have been proactive in certain aspects there is a more modern movement of proactive law that in turn has emerged from more specific needs for a new approach. Practical experiences as well as theoretical studies show that there is much to be gained by further developing means and methods that place an emphasis on the proactive dimensions of the legal domain. This applies not least to the variety of professional roles that a legally educated person may encounter in today's working life.

Proactive law may thus be conceived of as *a fundamental perspective* within the legal discipline which has been especially investigated into in the United States and, further developed in Finland and other Nordic countries.\(^3\) A major incentive is to avoid legal problems and costly litigation by way of practicing law in a proactive, preventive way.
Yet another aspect of proactive law can be traced to the legal discipline of law and informatics ("rättsinformatik") which has a tradition of studying the needs for proactive law in the context of modern information and communications technology. In an e-business environment, for instance, the need for proactive ICT law is constantly growing and at the same time not always that easy to detect, capture and merge into already existing business routines. Just to illustrate, standardised models for global e-business transactions are evolving and have to a growing extent also been put to practical use, which indicates a sound development, were it not for the legal uncertainties – more precisely how the legal aspects have or have not been integrated into the technical system design. It concerns e.g. jurisdictional differences between how to present a binding offer as opposed to an invitation to treat, and how to balance measures for privacy protection with security functions for authentication, and non-repudiation, et cetera. The demand to integrate law into technical e-business solutions is thus of major concern in order to achieve prospering e-business.

1.2 ACTIVITIES

Over the years a growing number of activities addressing proactive law in the Nordic countries can be noted. The first conference on proactive law was dedicated to “Future Law, Lawyering, and Language: Helping People and Business Succeed” and was organized in Helsinki, Finland in May 2003.¹

In response to a need to further develop practically oriented methods and legal theories of proactive law the Nordic School of Proactive Law (NSPL) was established in 2004.⁴ Consequently the NSPL network consists of both practitioners and researchers engaged in proactive law. Drawing on the Nordic experience in the front line of ICT development and the common legal and business culture the NSPL arranged the second conference on proactive law, titled “Fusing Best Business Practices with Legal Information Management and Technology”, in Stockholm, Sweden in June 2005.⁵ The underlying idea of the Stockholm '05 conference was expressed in the following way:

Contracts, information resources and IT are valuable assets and a source of strategic advantage. They create value and have fundamental impact on financial results. Consequently, they need to be planned, secured and protected effectively.
The modern information society currently challenges tools and techniques that have been developed over decades to support off-line, conventional business. It may be questioned to what extent traditional business methods apply in fast-paced transborder e-business. Of relevance is also to discuss how new technology solutions may contribute to the success of traditional business.6

Following this event, a consortium of organisers held the third conference about “Commercial Contracting for Strategic Advantage Potentials and Prospects” at Turku University of Applied Sciences (TUAS) on June 13-16 2007.7 With the aim here to highlight legal themes, particular mention should be made to the session on “Securing ICT Outsourcing Success through Proactive Law”. This session took its starting point in the fact that today’s global markets offer both potential and pitfalls. It was then demonstrated how outsourcing success depends on shared business goals, agreed service quality, contracts, and more. Early legal awareness and legal risk management were also discussed as sources of value-add.8

An outcome of the TUAS conference was the creation of a ProActive ThinkTank.9 It came about after discussions among a group of delegates interested in finding a way of developing the conference ideas further so that they can be used more widely in business, management and legal activities as well as in research, learning, development and training. The objectives are more precisely to raise the awareness of “the techniques and successes of a proactive approach to enable a sound foundation for business success, optimising risk/return and reducing legal problems”.10

Given the theme of this article being proactive – ICT – law in the Nordic Countries the reader might already have noticed that the approach presented above is not a simplistic legal one. Rather, the theme and activities show a multidisciplinary approach that in practice engage a variety of professional roles. Furthermore, it can be noted that geographical reference to the Nordic countries is somewhat fictional considering today’s internationalisation of law and business activities. The newly established ProActive ThinkTank illustrates this well.
2 FOCUS POINTS

2.1 CORE COMPONENTS IN A PROACTIVE APPROACH

Without attempting to capture every aspect of a proactive approach towards law, certain core components can be extracted. Previous and current proactive law activities manifest that attention is particularly paid to legal aspects of (a) project management, (b) contract and risk management, and (c) legal document management. The fact that the Nordic School of Proactive Law has a particular interest for the interaction of law and ICT implies a two-folded approach to these focus points, namely:

Project management involving ICT resources, capturing
• ICT supported project management
• Project management targeting ICT resources

Contract and risk management
• ICT Supported contract management
• Contract and risk management targeting ICT resources

Legal document management
• ICT supported management of legal documents
• Legal management of electronic documents

The foundations of the Nordic School of Proactive Law may more precisely be expressed in the following way. There is no doubt that proactivity is a major feature of the legal discipline, for instance, in the context of contracting and legislative activities. Furthermore, the characteristics of society as information oriented goes way back historically. But – and this is a major imperative – proactive law impacts differently in today’s information society, which in its term leads to a set of mission statements:\footnote{11}

(a) It is important to be aware of and actively integrate legal aspects in early stages of system and business process design and development.
(b) Tools and methods that appear to be merely of a technical nature often have legal consequences.
(c) Proactivity in project, contract and risk management ensures best business practices and results in enhanced business results.
(d) There is every reason for lawyers – working together with subject matter experts and ICT professionals – to take on new roles in the shaping of law and business in today’s information society.
2.2 SPECIFIC TOPIC AREAS IN A DIGITAL ENVIRONMENT

A major reason why it is worthwhile investigating into proactive law in a digital environment is to be found in the *infrastructural changes* associated with the introduction and use of ICT in society. Infrastructure may be both hard, e.g. broadband architectures, and soft, e.g. with regard to information management. With regard to the legal domain the notion of infrastructure may be explained as those parts of a legal system that forms the basis and conditions for legal activities.

Major components in a *legal infrastructure* can be listed in terms of data processing, documentation, communications, organisational forms, and identification entities. Of particular interest in this context is the shift from manual *data processing* towards automatic legal decision making taking place in e-government solutions involving public as well as private parties. Paper-based *documents* have to a considerable extent been replaced by electronic documents serving as a basis for contracting, evidential facts, etc. Furthermore, there is no doubt that previous hard-wired *communications forms* have been transformed into mobile channels for legal notifications and negotiations. Prior well-defined national *organisational entities* transform into cross-border networks and virtual organisations. The legally well-established distinction between natural persons on the one hand and legal (juridical) persons on the other is challenged by a whole variety of *identities* appearing in diversified internet communities.

In order to structure this brief picture of today's diversified information society it appears, however, fruitful to come back to the above extracted core components in a proactive approach, namely project management, contract and risk management and legal document management. A sample of proactive aspects are given below.

*(a) Project management*

Businesses based on system design and software involve particular steering mechanisms. The transformation of legal information expressed in traditional legal documents such as statutes, preparatory works, and decided (court) cases, contracts, et cetera into computer programs commonly involves subjective measures of interpretation. Proactive ICT law in this process implies legal awareness of how vague concepts and ambiguous rules must be transformed into strict criteria in order to be executed by a computer. Nowadays, automated procedures involving legal information have become a common feature in many sectors of society.
Another apt illustration of how proactive law impacts differently in the digital information society is that standardisation bodies of varying status have a major impact on the conditions for electronic messaging, content management, information security, etc. Vocabulary design directed towards a unified business language for e-commerce is one example that calls for particular legal attention.\textsuperscript{12}

As indicated above, the increased demand for proactive law has to do with the fact that information resources and e-solutions of various kinds are valuable assets, and that they need to be managed effectively. The management of such assets is not a trivial task, however. Consider, for instance, software and license auctions on a global digital marketplace which calls for new means and methods. At the same time it is important that the business knowledge gained and methods developed over many years are taken advantage of in the Internet era.

\textit{(b) Contract and risk management}

For lawyers and business managers alike, contract and risk management generates control and visibility of company rights and obligations and promotes sound risk control and compliance policies. Contract and risk management may also be described as a disciplined, system-based approach to contracting processes and documents. It works both on-line and off-line and is applicable across many business contexts. The focus is on key elements contributing to or endangering business success. It concerns also how to take advantage of contract and risk management for bid processes, procurement, software and information resources, etc. One important point to be made in this context is that business managers, legal and IT professionals must work together to achieve full benefit from contract and risk management and the related systems and solutions.

To further illustrate, new business models such as single sign-on electronic market places gives rise to a number of legal issues. A basic idea is that a consumer, after having logged in just once, can enter into new deals with a whole set of vendors and suppliers without further identification measures. The legal challenge posed by such a business model is how to comply with both pre-contractual and post-contractual duties as well as requirements of individual response. Electronic marketing is another feature of modern business models. In order to avoid being accused of unlawful spamming it is necessary to pay early attention to predominating infrastructures for telecommunications and information management as well as applicable legal frameworks. Cross-border
e-commerce evidently gives rise to jurisdictional issues. In this context there is reason to perform risk assessments of websites for insurance purposes, et cetera. Risk control and visibility for corporate governance is also of importance.

(c) Legal document management

*Legal document management* refers to a whole variety of issues of relevance to business activities in general, and the need for *security measures* in particular. In principle every organisation, be it a private enterprise or a public agency, needs to reflect on the handling of documents governing internal as well as external actions. Of major importance here is the concept of authority which covers a wide variety of actions, e.g. authorisation to enter into a contract, law enforcement, as well as the right of starting up a manufacturing industrial process. The underlying assumption is that these actions are derived from some kind of normative policy-making document.

With this in mind one may reflect upon the fact that open systems are a major development trend in today’s communications networks. One important concern is, therefore, the best ways in which to proactively secure trails of authorisations, including alterations. More precisely, this is a matter of information security policies mirroring the norms that govern an organisation, such as who has right of access to what, without knowing beforehand who will be claiming this right of access.

Consequently, there is a practical need for clarifications of the legal requirements and effects of various kinds of electronic signatures. Legally founded means and methods for long-term storage of digital business data are also essential.

### 3 DEVELOPMENTS

A concrete example of developments within the area of proactive ICT law in the Nordic countries concerns *education and training activities*. For the first time the perspective of proactive ICT law has been incorporated as a course component of its own at the Faculty of Law Stockholm University. More precisely, the Master Programme in Law and IT now comprises lectures and seminars about ICT Contract Risk Management in a study block titled “The Future of IT and Law”. Attention to advantages associated with law playing a proactive role is also paid within the undergraduate law programme in connection with the study of general jurisprudence.
It is furthermore rewarding to note that the doctrine of ICT oriented proactive law is constantly growing. In addition to conference proceedings the following kinds of publications can be found. In 2003 Peter Wahlgren published the monograph “Legal risk analysis – towards a more secure legal method”.\textsuperscript{14} Erik Helling is the author of the article “Proactivity and Interdisciplinary Co-Operation in the Context of the Legal Role”, published in the Nordic Yearbook of Law & Informatics 2004.\textsuperscript{15} In October 2005 Jan Trzakowsky presented his PhD thesis “Legal Risk Management in Electronic Commerce: managing the risk of cross-border law enforcement” at Copenhagen Business School.\textsuperscript{16}

With regard to proactive law in practice one noteworthy development is that of legally oriented check list approaches to e-business applications appearing more frequently on the market. An overall goal is here to bridge over professional roles by way of providing non-lawyers involved in system design and management a basis for evaluations of whether legal issues have been taken care of. Naturally this is not similar to saying that professional legal advice can be easily replaced by superficially going through questions concerning: applicable law(s) legitimate personal data processing, fulfilment of information duties, compliance with marketing regulations, infringements of intellectual property rights, et cetera. However, the fact that legal checklists are brought in at early stages certainly supports problem prevention.

A somewhat related development trend concerns the growth of practically oriented rules and regulations issued by public agencies directed to the modern information society. These kinds of legal steering instruments commonly appear at low norm hierarchical levels, for instance in the form of so called guidelines. To exemplify, the Swedish national E-committee (“E-nämnden”) has published a guide for mandatory information that must be published on websites:\textsuperscript{17} containing information of much relevance for the private sector. From a constitutional point of view it may of course be questioned whether this regulative method adheres to fundamental principles of parliamentary well-founded normative decisions. Nevertheless, there is no doubt that the kind of pragmatic standpoints – and in this respect proactive too – are much sought after on the market.
Yet another sign of developments in the line of proactive ICT law is the work to implement so called legal user interfaces. The goal is to integrate legally correct system functionalities by way of placing an emphasis on web-based user dialogues, explanatory legal texts, information management, et cetera. In particular this method has been applied for the purpose of accomplishing secure e-communications.

Finally but not the least, the social aspect of proactive ICT law in the information society ought to be mentioned. It concerns the need for proactivity in connection with legal information supply in order to prevent deepening of the so called digital divide. The digital divide is a notion that refers to the fact that the introduction and use of modern information and communications technologies does not automatically take place on fair grounds. It is well known that in a global perspective access to ICT varies considerably between people in industrialised countries as opposed to nations that still are at an agricultural stage.

The current state of legal information supply is characterised by a rapid quantitative growth in combination with an internationalisation in terms of trans-border data flows. As commented on above, the legal on-line market is responding to these developments by way of business mergers, technical novelties involving a wide variety of actors including well established public and commercial ones as well as new types of cross-sector consortia.

In spite of a vivid business situation there are still access barriers to legal information. To mention just a few, information retrieval methods are to a considerable extent still based on Boolean search mechanisms taken into use many decades ago. Of course, the web with services like Google has drastically changed the conditions for information dissemination in general, but not necessarily in favour of legal information retrieval in particular. Measures for evaluation of recall, precision, coverage, etc. are not that easily envisaged. Furthermore, comparatively advanced retrieval tools, using for instance probabilistic (statistical) methods have not yet come into broad use.

Yet another access barrier relates to the situation of insufficient harmonisation of legal document formats, structures and contents representing legal information. Although the use of the information standard XML (eXtensible Markup Language) has become a key approach much work remains.
A true challenge, in terms of making legal information more available, concerns the traditional attempt to accomplish contextual readability – or actually conceivability – based on linear text representation. Applications of ICT today offer means for non-linear text management including the insertion of animations and sounds. The future will tell to what extent this is or will be attractive to the legal domain and for the proactive community to support, by favouring non-proprietary technical platforms and official electronic originals of public information that are based on trustworthy security measures.

4 SUMMING UP

Proactivity is no doubt one feature of traditional legal work. Obviously law plays a proactive role in the context of e.g. regulatory and contracting activities. The other side of the coin is naturally reactive law in judiciary settings and regulations decided in response to undesirable actions. The important point to be made here is that challenges arising from e-business taking place in a global marketplace necessitates that lawyers refine and explore new ways to work both together and with other professionals. Additionally there are new professional categories shaping the law outside of established normative forums. For instance, system engineers commonly have a decisive impact on the design of e-business applications and document managers are core actors when strategies for electronic records keeping are drawn up.

Over the last five years investigations into how proactive law facilitates value-driving business models and how new technology at the same time can support proactive law have increased. More precisely, discussions concerning the use of available technical tools and methods in combination with proactively working lawyers can help clients to design and master their contracts and transactions so that they produce predictable results, promote business success, and avoid unnecessary problems.

In general terms movements of proactive ICT law in the Nordic countries may be conceived of as a particular kind of awareness and strategies called for in today’s information society. In a digital environment proactive law is used as a common denominator for a fusion of proactive legal thinking and utilisation of information management and technology in order to facilitate best business practices. It comprises steering mechanisms such as normative instruments including conventional legal rules and regulations as well as computer programs.
and information standards. Improved negotiations, decision-making and documentation are other critical factors.

The Nordic School of Proactive Law seeks to be a catalyst in forthcoming discussions on proactivity and hopes to provide input to future work in a variety of arenas such as private and public organisations, commissions, standardisation bodies, private associations developing codes of conduct, societies for suppliers and vendors, etc.

Finally, mention should be made of a forthcoming event taking place in Stockholm November 17–19th 2008. In connection with the XXIII Nordic Conference of Law and Informatics there will be sessions focusing on currently well established aspects of proactive law. One will address legal risk analyses in ICT projects and another one will place an emphasis on contract management and outsourcing. The speakers at these sessions – active in the development of the Nordic School of Proactive Law and/or of the ProActive ThinkTank – will present some of the outcomes of their work: research results as well as tested tools, techniques and practices that can be used proactively for business success and problem prevention.

Endnotes

1. Information Communications Technologies


4. For more information about this field of law see for instance the website of the Swedish Law & Informatics Research Institute at www.juridicum.su.se/iri.

5. ‘E’ stands for ‘electronic’.


7. See further /www.proactivelaw.org/.


9. The underlying theme of the conference was as already indicated proactive law in the context of a global IT-based information society. The conference title – Fusing best business practices with legal information management and technology – intended to capture this overall goal, implying also that corporate governance is much more than merely legal compliance. Furthermore, legal information was defined broadly, comprising both core legal sources such as legal regulations of different kinds as well as legally relevant information, e.g. an electronically signed business record of exchanged business. The term business is here to be understood broadly, comprising activities in the private as well as public sector.


11. Presentations were made by Claude Mayer and Tobias Mahler.


16. This master programme has been running since 1999 and is open to law graduates from all over the world. The present curriculum comprises four courses ranging from traditional ICT Law to Development and Management of Information Systems in a Legal Perspective. The students are required to pass written examinations and write two theses during the Programme, Seminars, practical assignments, weekly discussions and so called “in real life experiences” aim at providing the students with skills necessary for their future work as either practitioners or researchers in the chosen field. Issues of practical interest are interwoven

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with scholarly treatment of legal problems and practical work with various legal IT tools. See further www.juridicum.su.se/iri/masterIT/.


21. See in particular www.skatteverket.se (“legala gränssnitt”).


25. Conference information will be published at www.proactivelaw.org.