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# Online penny auctions and the protection of the consumer under EU law

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## ABSTRACT

### Keywords:

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This paper examines online penny auctions, which currently attract consumer traffic but pose consumer risks also. It discusses pressing questions such as whether they are scams, entertainment shopping or gambling. It shows that though they cannot readily be considered as scams, they are suspiciously risky for consumers. Moreover, contrary to what penny auctioneers suggest, they do not allow for consumer shopping. They also share several characteristics with gambling and therefore, the possibility of legally classifying them as such is worth exploring. If they are not gambling, consumer protection legislation is fully applicable to them and can satisfactorily protect penny consumers. If penny auctions are legally classified as gambling however, protection will greatly be enhanced; they will (additionally) be subjected to strict and detailed gambling laws at least in the UK, where a mature gambling regulatory regime exists. Certain disadvantages of labeling penny auctions as gambling can relatively easily be remedied through suitably adjusting gambling laws. The paper concludes by suggesting possible approaches of legal regulation of this new online phenomenon.

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## 1. Introduction

Online penny auctions are a new business concept. 'Swoopo', the first penny website began operation under the name Telebid in 2005.<sup>1</sup> Swoopo was an auction house, albeit not of the eBay type. Indeed, (expensive) products were being auctioned

and sold at a nominal fraction of their retail price. The sale of a Sony TV set for £30.70 for example, was not just possible. It was the norm. Swoopo grew big achieving millions of Euros in sales and thousands of daily visitors. It even attracted investments by American capital investment firms.<sup>2</sup>

Swoopo is no longer operative<sup>3</sup> but its underlying idea is not dead. In fact, the last few years have seen a 'penny

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<sup>1</sup> Rich Leigh, 'Innovative Internet Auction Platform Telebid Is Now Called Swoopo' (10yetis 2010) <<http://www.10yetis.co.uk/releases/swoopo.html>> accessed 25 July 2013.

<sup>2</sup> August Capital, 'August Capital Invests in Swoopo' (Augustcapital 2009) <<http://augustcapital.typepad.com/news/2009/04/august-capital-invests-in-swoopo.html>> accessed 25 July 2013.

<sup>3</sup> It actually went bankrupt, something that may be of great relevance to the risky nature and even the question of legitimacy of the relevant business model, see text at p 544.

auction' boom. As Robinson et al. observe "the number of penny auction websites increased 15,000% in less than five years".<sup>4</sup> Quibids,<sup>5</sup> BidCactus,<sup>6</sup> BeeZid<sup>7</sup> and BidFun<sup>8</sup> are only a few examples. Penny auctions seem also to have been creating an industry of their own. Indeed, there are several directories,<sup>9</sup> blogs and forums that list, review and rate penny websites.<sup>10</sup> There are also books with advice on how to win<sup>11</sup> as well as websites selling relevant scripts and web templates.<sup>12</sup>

The particular business model merits a 'consumer protection' inquiry especially given the increasing voices against it. There are indeed claims that it is unsustainable, fraudulent and/or dangerous for consumers and yet, it has not been given sufficient attention by lawyers and policymakers. This paper aspires to fill in this gap. First, it explains the origins and main characteristics of penny auctions. Secondly, it discusses the question whether penny websites are scams. This is a frequently-raised question and also has repercussions on their significance from a legal point of view. Indeed, if penny auctions could readily be dismissed as being inherently illegitimate or a fraud, penny websites would be liable to be shut down through resort to basic provisions of consumer and even criminal law.

However, penny auctions cannot readily be considered as scams. They are currently conducted on professionally-designed websites and close thousands of deals with consumers, thus claiming a place on the Internet as innovative e-commerce players. Therefore, an inquiry into how 'consumer protection' legislation applies to them is warranted not only to answer the difficult question regarding whether they are legitimate or not but also to reveal whether penny consumers are sufficiently protected against the risks involved. Also, the question whether penny auctions are gambling is important because it has ramifications on the body of law applicable to them. Is it general 'consumer protection' legislation, gambling

laws or both? Would it make a difference to the penny consumer? If penny auctions are deemed as gambling, some 'consumer protection' legislation may be inapplicable to them. Do gambling laws fill in this gap?

These questions of legal classification and application of consumer and gambling laws to penny auctions will comprise the main concern of this paper. The paper concludes that EU consumer law is well-equipped to respond to the risks involved. If penny auctions are legally considered as gambling, some important 'consumer protection' legislation will be inapplicable to them. Yet, gambling laws can be far more detailed and demanding than general consumer laws and thus capable of greatly enhancing the position of penny consumers. Furthermore, the bulk of relevant 'consumer protection' legislation will still be applicable to penny auctions and therefore, penny consumers will not be disadvantaged if penny auctions are legally deemed as gambling. This is true especially given that any gaps in protection probably left as a result of the inapplicability of certain consumer law to gambling can easily be remedied. The paper finally suggests possible approaches of legal regulation, which policymakers and regulators can choose from or combine to respond to the needs of penny consumers.

## 2. Online penny auctions: characteristics and origin

Online penny auctions are said to have their roots in the "dollar auction",<sup>13</sup> an economic non-zero sum game inceptioned by an economist to inquire into player behavior.<sup>14</sup> Yet, their origins can be traced back to the 1920s and the US Great Depression, when bank foreclosures of farms were provoking rage amongst farmers who were determined to protect their fellows. Thus, when a farm was put on auction, neighbor farmers were bidding only a few cents and prevented strangers from placing higher bids. Many such auctions were closing at just a few dollars and the winner-buyer was returning the farm to its owner.<sup>15</sup>

Online penny auctions close at very low prices too. If the product is inexpensive such as a USB stick, the closing price can even be a few pennies, something that rarely occurs on eBay-like platforms. Actually, except that bidders compete for the one who is to be the last bidder, penny auctions have nothing in common with their eBay-like counterparts.

Indeed, bidding on eBay is free whereas one must pay to bid at penny auctions. 'Paid' bidding is the cornerstone of the 'penny auction' business model, hence why these auctions

<sup>4</sup> Stacey G. Robinson, Michael D. Giebelhausen and June Cotte, 'Shopping, gambling or shambling? Penny auctions' [2013] *Journal of Business Research* 1612, 1613.

<sup>5</sup> Quibids, 'The Best Online Auction Site!' (Quibids) <<http://www.quibids.com/>> accessed 25 July 2013.

<sup>6</sup> 'Bid on Penny Auctions' (Bidcactus 2013) <<http://www.bidcactus.com>> accessed 25 July 2013.

<sup>7</sup> BeeZid Inc., 'BeeZid.com: Penny Auctions#1 Penny Auction Site|Online Auctions' (BeeZid 2013) <<http://www.beezid.com/>> accessed 25 July 2013.

<sup>8</sup> Naxopresence UK Ltd, 'BidFun' (Bidfun 2009–2013) <<http://www.bidfun.com/>> accessed 25 July 2013.

<sup>9</sup> See for example, StatStrike Ltd, 'Complete Penny Auction Site Listing' (Allpennyauctions.com 2010–2013) <[http://www.allpennyauctions.com/complete\\_penny\\_auction\\_site\\_list/](http://www.allpennyauctions.com/complete_penny_auction_site_list/)> accessed 25 July 2013.

<sup>10</sup> See for example, Amanda Lee, Penny Auction Watch®|Penny Auctions | Penny Auction Sites <<http://www.pennyauctionwatch.com/>> accessed 25 July 2013.

<sup>11</sup> See for example, Geoffrey Cameron, 'Penny Auction Strategies. Practically "Cheat" At Penny Auctions!' (Pennyauctioncheats 2010–2011) <<http://www.pennyauctioncheats.com/>> accessed 25 July 2013 and Adam Young, *The Ultimate Guide to Penny Auctions: Winning Strategies, Tips and Tricks to Penny Auction Domination, How to Win More Penny Auctions Using Less Bids* (1st, Booktango, 2013).

<sup>12</sup> 'Penny Auction Script' (Pennyauctionscript) <<http://www.pennyauctionscript.com/>> accessed 25 July 2013.

<sup>13</sup> Martin Shubik, 'The Dollar Auction Game: A Paradox in Noncooperative Behavior and Escalation' [1971] *Journal of Conflict Resolution* 109.

<sup>14</sup> 'The History of Penny Auctions' (Pennyauctionwizards.com 2012) <<http://www.pennyauctionwizards.com/the-history-of-penny-auctions/>> accessed 25 July 2013.

<sup>15</sup> 'What's a Penny Auction?' (Newdeal 2003) <<http://newdeal.feri.org/timeline/1933c2.htm>> accessed 25 July 2013.

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