COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.11.1998
COM(1998) 586 final

98/0325 (COD)

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on certain legal aspects of electronic commerce in the internal market

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(presented by the Commission)

EXECUTIVE SUMMARY

I. OBJECTIVE

II. NECESSITY OF A LEGAL FRAMEWORK FOR THE INTERNAL MARKET

1. *Lack of clarity in the existing legal framework*
2. *Significant economic costs*
3. *The impact on investment by and competitiveness of European companies*
4. *The lack of confidence on the part of consumers*

III. ISSUES TO BE ADDRESSED

1. *The establishment of service providers*
2. *Commercial communications*
3. *Electronic contracts*
4. *Liability of intermediaries*
5. *Settlement of disputes*
6. *The role of national authorities and the principle of country of origin*

IV. THE APPROACH ADOPTED

1. *Address only what is strictly necessary for the internal market*
2. *Encompass all Information Society services*
3. *Address the issues in the same instrument*
4. *Refrain from dealing with external aspects*
5. *Taking account of fundamental rights and liberties*
6. *Establish a light, evolutionary and flexible framework.*
7. *Ensure a high level of consumer protection*

Annex : Commentary on individual Articles

EXECUTIVE SUMMARY

Electronic commerce offers the Community a unique opportunity for economic growth, to improve European industry's competitiveness and to stimulate investment in innovation and the creation of new jobs. But such benefits will not be optimised unless the many legal obstacles which remain to the on-line provision of services (particularly important for cross border trade and for SMEs) are eliminated. The present proposal intends to remove such obstacles thereby allowing our citizens and our industry to benefit in full from the development of electronic commerce in Europe.

The Commission's 1997 Communication on electronic commerce[1] set a clear objective of creating a European coherent legal framework by the year 2000. This proposal meets that objective. It builds upon and completes a number of other initiatives[2] that, together, will eliminate the remaining legal obstacles, while ensuring that general interest objectives are met, particularly the achievement of a high level of consumer protection. This proposal will reinforce the position of the Community in the international discussions on the legal aspects of electronic commerce which are currently underway in a number of international fora (WTO, WIPO, UNCITRAL, OECD). The Community will thus secure a major role in international negotiations and significantly contribute to the establishment of a global policy for electronic commerce.

The proposal is based on the orientations set out by the Commission in the 1997 Communication. It provides a light, enabling and flexible approach. Particular attention has been paid both to the special nature of the internet and to the role of interested parties and of self-regulation. The proposal meets the principles of subsidiarity and proportionality by covering only those issues where a Community initiative is indispensable. These issues, which were also identified in the Commission's 1997 Communication, have been subsequently endorsed by the European Parliament[3]. They are the subject of work at Member State and international level and are being discussed by industry and other interested parties.

At present, there is uncertainty in a number of areas about how existing legislation can be applied to the on-line provision of services. There is divergent national legislation already in place or currently being discussed. Furthermore, diverging jurisprudence is emerging. The proposal therefore seeks to remove the obstacles that result from such conditions, for service providers established in Europe, by tackling five key issues that together form a coherent framework to bring about the free circulation of on-line services. These issues are all inter-related because obstacles to electronic commerce services can arise at each step of the economic activity (from the promotion and the sale of a good or service to the settlement of disputes) and because none of these obstacles can be removed in isolation (for example, clarifying a service provider's liability is not possible without defining its

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1 "A European Initiative on Electronic Commerce", COM(97) 157 final, 16.4.1997.

2 Amongst the most recent are the directives on the "regulatory transparency mechanism", the protection of personal data, the protection of consumers in respect of contracts negotiated at a distance; and the proposals on the legal protection of conditional access services, electronic signatures, copyright and related rights and electronic money.

3 European Parliament Resolution A4-0173/98 on the Communication from the Commission on "A European Initiative on Electronic Commerce", 14.5.1998.

place of establishment). Accordingly, the European Parliament, in its recent resolution, has asked the Commission to speed up the process of presenting a proposal for a directive which would address these issues in a coherent way.

These five issues are the following:

(1) Establishment of Information Society service providers

The proposal removes the current legal uncertainty surrounding this issue by providing a definition of the place of establishment in line with the principles established by the Treaty and the jurisprudence of the Court of Justice. This is a key element for the proper functioning of the Single Market. In addition, the proposal prohibits special authorisation schemes for Information Society services and sets out some information requirements that the provider must fulfil in order to ensure transparency of its activities.

(2) Commercial communications (advertising, direct marketing, etc.)

Commercial communications are an essential part of most electronic commerce services. It is therefore important to clarify and facilitate their use. The proposal thus defines what constitutes a commercial communication and makes it subject to certain transparency requirements to ensure consumer confidence and fair trading. In order to allow consumers to react more readily to harmful intrusion, the proposal requires that commercial communications by e-mail are clearly identifiable. In addition, for regulated professions (such as lawyers or accountants), the proposal lays down the general principle that commercial communications are permitted provided they respect certain rules of professional ethics which should be reflected in codes of conduit to be drawn up by professional associations.

(3) On-line conclusion of contracts

Electronic commerce will not fully develop if concluding on-line contracts is hampered by certain form and other requirements which are not adapted to the on-line environment. To this end, Member States shall be obliged to adjust their national legislation. In addition, the proposal removes legal insecurity by clarifying in certain cases the moment of conclusion of the contract, whilst fully respecting contractual freedom.

(4) Liability of intermediaries

To facilitate the flow of electronic commerce activities, there is a recognised need to clarify the responsibility of on-line service providers for transmitting and storing third party information (i.e. when service providers act as "intermediaries"). To eliminate the existing legal uncertainty and to bring coherence to the different approaches that are emerging at Member State level, the proposal establishes a "mere conduit" exemption and limits service provider's liability for other "intermediary" activities. A careful balance is sought between the different interests involved in order to stimulate cooperation between different parties thereby reducing the risk of illegal activity on-line.

(5) Implementation

Rather than inventing new rules, the Commission has sought to ensure that existing EC and national legislation is effectively enforced. By strengthening enforcement mechanisms, the development of a genuine Internal Market – based on mutual confidence between Member States - is stimulated. Such strengthening is achieved by encouraging the development of codes of conduct at Community level, by stimulating administrative cooperation between Member States and by facilitating the setting up of effective cross-border alternative dispute resolution systems. For similar reasons the proposal also requires Member States to provide for fast, efficient legal redress appropriate to the on-line environment.

EXPLANATORY MEMORANDUM

I. OBJECTIVE

Electronic commerce provides the Community with a unique opportunity to create economic growth, a competitive European industry and new jobs. The legal framework of the internal market and the euro are key tools for exploiting this opportunity.

Electronic commerce is global and requires increased international coordination. The European Union has launched a dialogue on the implications of the global electronic market place within the framework of the Global Business Dialogue. The latter seeks to ensure a coherent approach between public and private sectors at the global level.

However, pending the establishment of a set of rules covering the different areas at global level, the Union must act in order to establish within Europe a genuine single market for electronic commerce. This single market must ensure that European businesses and citizens are able to receive and supply Information Society services throughout the Community, irrespective of frontiers. Indeed, the legal framework of the internal market forms a major asset for electronic commerce, and electronic commerce forms a major asset for the internal market:

- for the *construction of Europe*, electronic commerce in the area without frontiers will bring together the peoples of Europe, promote trade between them and increase knowledge of their cultural diversity;

- for *European citizens and consumers*, electronic commerce will provide increased access to goods and services of better quality at lower prices and heighten attention for the protection of citizens at Community level, not only at national level;

- for *European enterprises*, especially SMEs, electronic commerce will provide considerable opportunities for growth and will encourage investment in innovation.

- for *employment growth within the Community.* Even if it is not possible to estimate the total number of people currently employed in electronic commerce activities, these activities offer a true employment potential. For example, according to recent estimations more than 400 000 Information Society related jobs were created within the Community between 1995 and 1997. It is estimated that one in four new jobs is derived from these activities; that there are 500 000 unfilled vacancies requiring Information Society skills and that 60% of these are in SMEs seeking to develop their electronic commerce activities.

The Commission has already set out the approach it is pursuing to ensure that this potential can be realised. In its communication *"A European initiative in electronic commerce"*[4] it announced the creation of a legal framework for the internal market based on the principle of country of origin control. The features of this approach include, in particular, avoiding over-regulation, basing regulation on internal-market freedoms, taking account of business realities and meeting general interest objectives effectively and efficiently. The

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4 COM(97) 157 final, 16.4.1997, Chapter 3.

Commission emphasises the urgency of implementing this policy as the measures set out in must be the communication taken by the year 2000.

The Commission's work, based on these principles and studies as well as consultations with interested parties, has identified a number of legal problems which must be resolved quickly at Community level. In its work the Commission has taken particular account of the opinion of the *European Parliament*, as expressed in its resolution of 15 April 1998[5] on the communication from the Commission, which urged the Commission to present a proposal for a Directive on Information Society services in order to clarify the regulatory framework and to safeguard the rights of users of electronic commerce[6]. The Commission has also taken account of the opinions of the Committee of the Regions and of the Economic and Social Committee[7], of the consultations held with interested parties on the basis of the Communication and of other initiatives on the Information Society.

II. NECESSITY OF A LEGAL FRAMEWORK FOR THE INTERNAL MARKET

Electronic commerce consists of Information Society service[8] activities. These consist of a large variety of on-line services, for example, the sale of goods or services or the free provision of information remunerated by commercial communication. These services do not develop in a legal vacuum; they are already subject to a series of national, Community or international rules. However, having regard to the aims of the internal market (Article 7a of the EC Treaty), the principles of freedom of establishment (Article 52 of the EC Treaty) and of the freedom to provide services (Articles 59 and 60 of the EC Treaty), certain aspects of the existing legal framework must be clarified in order to increase legal security: Indeed, certain legal barriers hamper the exercise of these freedoms by an Information Society service provider, or a citizen using these services or make their exercise less attractive.

1. Lack of clarity in the existing legal framework

Differences in certain legal provisions applicable to Information Society services in different Member States can result in a situation where, as an exception to the principle of free movement and subject to conformity with the case law of the Court of Justice, one Member State may make the provision of a service from another Member State conditional on supervisory measures or the application of its own legislation. In practice this means that a service provider wishing to offer a service throughout the internal market must, in addition to the compliance with the with the rules of the country in which he is established, ensure that the service is compatible with the law of the other 14 Member States.

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5 Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on "A European initiative in electronic commerce", A4-0173/98.

6 Resolution of 14 April 1998, point 14.

7 Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: "A European initiative in electronic commerce", OJ C 19, 21.1.1998, p. 72.

8 See point IV(2).

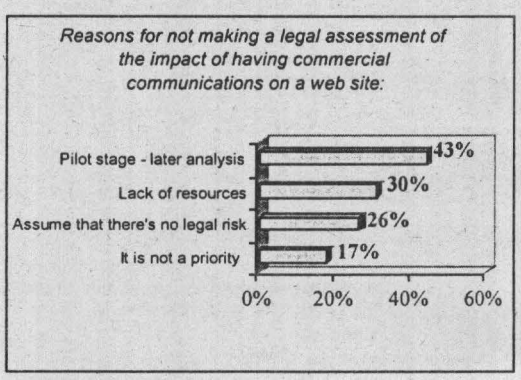
A significant lack of legal certainty characterises the current legal framework. This legal uncertainty arises over the lawfulness of measures taken by one Member State concerning services provided by providers established in another Member State (are they justified in relation to the principle of freedom to provide services or of secondary Community law applying that principle?) Legal uncertainty also arises in determining the requirements to be met by Information Society services (to what extent does a particular rule apply to such services?) Cases which have already been decided diverge, indicating that there is a serious lack of legal certainty whose adverse effects are strongly amplified in a cross-border situation.

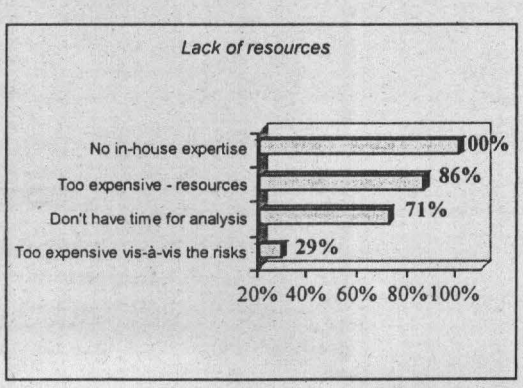
Moves in certain Member States to enact new legislation are apparent and there are already differences in approach which entail a real risk in the short term of fragmenting the internal market. Some Member States have already enacted legislation specifically addressing Information Society services (D) while others have begun a large scale amendment of their rules (B, F, FIN, I, NL); lastly, in some Member States specific issues are the subject of surveys , draft proposals or new legislation , (for example, regulated professions (A, F, D, I); liability (F, NL, S, UK); and contracts (A, B, D, NL, DK, S)).

2. Significant economic costs

The current legal framework gives rise to significant costs for operators wishing to develop their activities across borders. The results of a survey undertaken within the *"Commercial Communications"* newsletter[9] demonstrate the significance and specific nature of these costs.

The significance of legal costs: 64% of respondents undertook a legal analysis of the regulatory situation and notably regarding the cross-border situation. Of the 36% who did not, 43% had not yet done so because they were still in pilot phases and 30% because they could not afford to undertake such an evaluation.





Estimated legal costs to launch an Information Society service vary enormously. Several examples demonstrate how they often amount to considerable sums: one operator responded that he is using three to four days of external legal advice per month, another uses 50 hours per month of both internal and external legal advice (amounting to approximately DEM 70 000 per year), another used fifty days of both in-house and external

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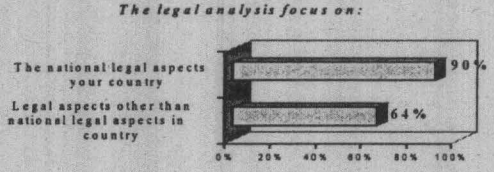
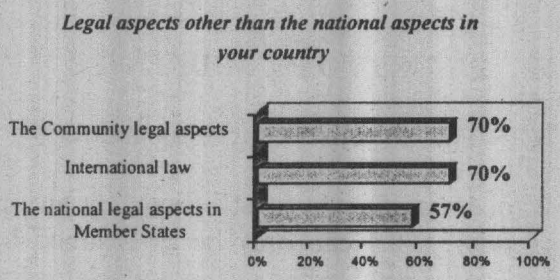
9 This consists of a questionnaire distributed as an insert in the "Commercial Communications" newsletter sponsored by Directorate-General XV which was answered by interested parties. To date some 80 responses have been received.

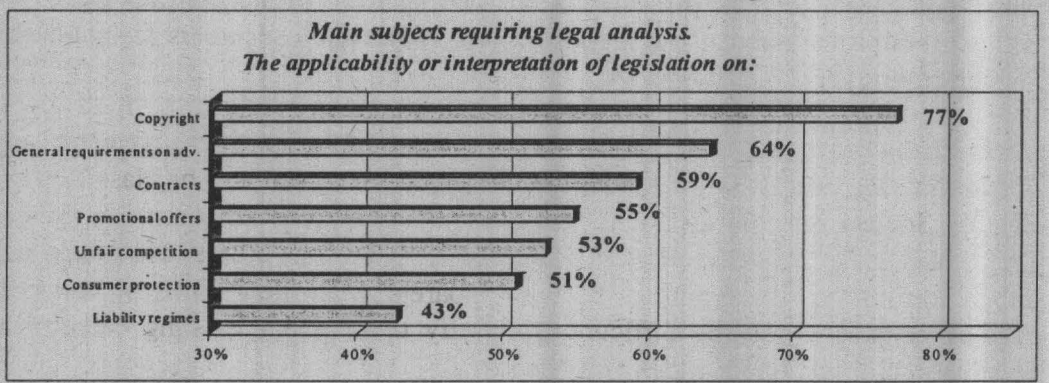
legal advice to launch a new service and an SME indicated that it had to employ a lawyer on a full-time basis. One of the key operators in the electronic commerce market noted that he has to rely on eight in-house lawyers dedicating 45 hours per week and 18 outside legal advisers who on average supply 175 hours of advice per week. For the UK market alone, this operator estimated that a review of the regulatory framework for his Information Society service cost him ECU 60 000.

The specificity of the legal costs associated with electronic commerce of those who have undertaken a legal analysis, no less than 40% believe that the legal uncertainty that characterised electronic commerce was greater than for other lines of business. The cross-border dimension of the activity also distinguishes it since 64% evaluated legal aspects other than those in their own country and 57% believed it was essential to evaluate how the activity would be treated in other Member States. Moreover, of those who did not make a legal assessment, only 26% denied that there was a risk and 30% would have done so if they had had the resources to.





The key areas giving rise to legal costs: The survey allowed for the identification of the legal issues giving rise to the most significant problems:



3. The impact on investment by and competitiveness of European companies

At present, an operator wishing to engage in electronic commerce across the internal market almost invariably has no certainty that his service will not be subject to the control of, or the imposition of direct or indirect restrictions by, other Member States in addition to the Member State in which he is established. In view of this risk, the business must seek legal advice (from lawyers, consultants, etc.) in each Member State and negotiate with the authorities of those States in order to be sure that their activities are lawful there.

The impact on investment: operators, particularly SMEs and microenterprises, being unable to afford high-quality legal advice, are discouraged from exploiting the opportunities afforded by the internal market and investing in the European development of their businesses.

The impact on the competitiveness of European enterprises: operators must plan their service so that it is compatible with the requirements of all Member States. This is a disincentive for investment in innovation and may lead to the services being designed to meet the requirements of the most severe restrictions. This means that some SMEs and microenterprises are less competitive than businesses with the funds to invest in an evaluation of the risks of securing access to the new market in electronic commerce while remaining within the law.

4. The lack of confidence on the part of consumers

Consumers, and more generally, recipients of services may feel that they are in an unclear and vague situation with few guarantees as to the level of protection afforded and they may therefore be unwilling to conclude on-line contracts and exploit new opportunities.

III. ISSUES TO BE ADDRESSED

1. The establishment of operators

What requirements must be met by an operator wishing to provide Information Society services? This can only be determined by ascertaining the Member State in which the operator is established so that the relevant rules concerning establishment can be identified. There are wide divergences of approach and many factors giving rise to legal uncertainty in this area:

- *determining the place of establishment* of an on-line service is particularly difficult; is it determined by the server which hosts a site, the ability to have access to a site in a Member State, or is it a simple letter box? The position in the Member States is very vague in this area and national authorities, operators and consumers are not clear as to which rules apply;

- some confusion also exists over the issue of *authorisation arrangements or declaration arrangements*. In most Member States, services that can be classified as Information Society services do not generally require a specific authorisation. Some Member States have rules requiring declarations while in others there are no prescribed formalities. Uncertainties become apparent when new kinds of services are established and it may be difficult to classify them under existing categories (press, telecommunications, audiovisual, etc.);

- given the principle of freedom of establishment (Article 52 of the Treaty) which must be enjoyed by all persons wishing to provide services over the internet, such a situation is unsatisfactory and calls for clarification to facilitate the exercise of this freedom.

2. Commercial communications

Commercial communication, (advertising, direct marketing, etc.), by its nature, forms part of most electronic commerce services and is an area where obstacles to the internal market are particularly marked:

- *existing definitions* in this area (for example "advertising", "sponsorship") give rise to uncertainty when they are applied to on-line services. For example, in most Member States it is unclear whether simply having an internet site, establishing a hypertext link, or using a domain name constitutes commercial communication. This is particularly harmful because, depending on the interpretation of existing definitions, rules which may or may not be suitable, will be triggered;

- the disparity in the rules on the *advertising of regulated professions* forms a clear obstacle to the development of professional services over the internet. The use of a site by a professional service is often considered to be commercial communication and Member States' laws on regulated professions differ markedly on this point; many Member States strictly prohibit advertising, for example, in the case of lawyers and doctors, in other Member States the rules are decidedly more flexible, in particular for the legal professions;

- national rules on *unfair competition* may have a very restrictive effect as their interpretation may result in prohibitions or restrictions on certain commercial practices, such as promotional offers or rebates and discounts. The effect is particularly serious in the case of new and innovative marketing practices and in view of the need to employ them on the internet to make the business stand out among the other services available;

- *transparency* requirements, (for example, an indication that it is an advertising message or is sponsored, etc.), are vague and very divergent. In most Member States there is no clear and general obligation to indicate on an internet site that commercial communication is involved or to indicate on whose behalf it appears. On the other hand, in some Member States requirements of this type may arise under general rules on consumer protection or fair trading or conversely under specific rules;

- new, *intrusive* commercial communication practices, such as "spamming", or advertising in discussion forums etc., raise issues which have already resulted in court cases or have led Member States to adopt legislation.

3. Electronic contracts

Apart from financing by commercial communication, on-line transactions (contractual undertakings, on-line payments, subscriptions) are another source of revenue on the internet. Specific obstacles restricting the possibility of concluding on-line contracts across frontiers have been identified:

- some *formal requirements* prevent contracts from being concluded electronically, or result in a considerable lack of legal certainty as to their lawfulness or validity. This may take the form of requirements which obviously rule out electronic contracts, (for example, a requirement that a contract be drawn up on paper), or more frequently, difficulty arising from the interpretation to be given to requirements such

as "in writing" (i.e. on paper), "in a durable medium", "an original". Such legal uncertainty clearly works against on-line transactions; some Member States are therefore considering amending their rules and the courts have already given rulings on this matter. At Community level, the recent proposal for a Directive on electronic signatures does not deal with formal requirements other than signature;

- the *particular acts* performed by the parties with a view to concluding electronic contracts may result in considerable legal uncertainty as to the conclusion of the contract. In particular, the same act of clicking on the "OK" icon may have different legal implications in different Member States (does it constitute acceptance of an offer to provide a service or a customer's offer to contract?) and can give rise to uncertainty as to the time when the contract was concluded (the time of receipt or of sending the acceptance?). This major divergence between the national legal systems, linked to the specific nature of the technological context, results in uncertainty in cross-border contractual relations, particularly for consumers, and is inimical to the development of the trust which is necessary for electronic commerce (one party may consider, on the basis of his own legal system, that the contract has been concluded while the other party, on the basis of his national rules, believes that he is not yet bound).

4. Liability of intermediaries

There is considerable legal uncertainty within Member States regarding the application of their existing liability regimes to providers of Information Society Services when they act as "intermediaries", i.e. when they transmit or host third party information (information provided by the users of the service) These activities have been the subject of the different Member States' initiatives adopted or currently being examined on the issue of liability.

In view of the limited degree of knowledge providers have about the information that they transmit or store via interactive communication networks, the main problem that arises is the allocation of liabilities between on-line service providers transmitting and storing illegal information and the persons who originally put such information on line.

Questions also arise as regards the ability of providers to control the information they transmit or store.

In this context, divergent principles have been adopted in those Member States which have introduced new legislation specifically addressing this issue. Equally divergent approaches are being discussed in those Member States which are assessing the need to legislate. Moreover, despite the limited case-law available in Europe, divergences in rulings and reasoning by the courts can already be noted.

For the internal market these divergences could be the source of obstacles for the cross border provision of Information Society services (for instance if a Member State decides to block access to information stored in the server of a service provider established in another Member State where the applicable liability regime is deemed to be unsatisfactory). In some Member States, this situation may also inhibit activities such as the provision of hosting facilities. Indeed the current situation creates an incentive for providers to establish such activities in Member States with favourable regimes (forum shopping). The situation

also leaves different parties (service providers, content providers, persons whose rights have been violated and consumers in general) under considerable legal uncertainty.

5. Settlement of disputes

Court actions or out-of-court redress for unlawful behaviour or disputes concerning the internet in cross-border cases are not always sufficiently effective or appropriate to induce businesses to provide services and customers, in particular consumers, to use them. Yet the Court of Justice has clearly[10] established that access to justice is a corollary of the freedoms of the area without internal frontiers. Moreover, the European Parliament has emphasised the need for arbitration.[11] This failure of the law to take account of the specific nature of the internet and of cross-border situations emerges at various levels:

- the *slowness of the remedy*: unlawful acts on the internet will produce loss and harm, characterised by their speed and wide geographical scope. In the context of the remedies for these problems, the effectiveness of emergency measures are sometimes dissuasive and should be improved;

- *the costs in relation to the nature of the activities*: apart from disputes between professionals, disputes concerning the internet may be on a small scale, involving small amounts (micropayments) or disputes between private individuals using an Information Society service (e.g. classified advertisements) which do not justify a full court action and are better served by out-of-court remedies. However, the conditions for implementing out-of-court measures are often not suited to an on-line context (lodging the original of an arbitral award with a tribunal, presence of the parties, notification, etc.);

- the procedures available to the *national authorities*, the cooperation between them and access to those authorities are not always transparent and effective. This aspect must be considered more systematically, covering Information Society services as a whole.

6. The role of national authorities and the principle of country of origin

In electronic commerce there is a great deal of uncertainty in determining which Member State has jurisdiction over a particular activity. In some cases the same activity may be subject to the supervision, and within the jurisdiction, of a number of Member States. As different links in the economic chain of a particular activity (the content provided, hosting, access to the internet, commercial communication, etc.) may be connected to the territory of a number of Member States, there may be multiple points of supervision and thus of legal frontiers. Yet, in other cases, some activities are not subject to supervision by the Member State on whose territory the service provider operates.

This uncertainty as to "who supervises what" is prejudicial to the free movement of Information Society services and the control of such services. It is therefore necessary to improve *the level of mutual confidence* between national authorities by clarifying the application of the principle of free movement of services. This principle (Articles 59 and

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10 See Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661.

11 European Parliament Resolution, 14.5.1998, point 32.

60 of the EC Treaty) tends towards control in the country where the provider is established (since, except under derogation, Member States may not restrict services coming from a service provider established in another Member State).

In practice the lack of a clear interpretation of "Information Society services", "service provider" and "establishment" means that the allocation of roles among Member States in the control of service providers remains unclear. In particular, the uncertainty over the meaning of "*establishment*" prevents national authorities' responsibilities from being clearly determined.

Moreover, the *lack of information* on the origin of the service provider and on his activities. National legislation shows that in most Member States, there is no systematic obligation to provide information on the site as such (i.e. apart from any offer made in a commercial contract).

Finally, the fact that operators cannot be certain that their service will not be subject to the application of restrictive measures in another Member State also requires clarification.

IV. THE APPROACH ADOPTED

1. Address only what is strictly necessary for the internal market

The approach is to interfere as little as possible with national legal rules and to do so only where it is strictly necessary for the proper functioning of the area without frontiers. In fact, the principal of mutual recognition and the body of existing Community law help reduce the need for new rules. Moreover, the parties involved can themselves deal effectively with many of the issues. This therefore reduces the remaining issues which call for regulatory intervention. Accordingly, the Directive does not need to cover complete areas of law, it can target specific aspects.

2. Encompass all Information Society services

The Directive applies to "Information Society services", i.e. all services normally provided against remuneration, at a distance by electronic means and on the individual request of a service receiver. This definition, has already been adopted in Directive 98/34/EC of the European Parliament and of the Council, laying down a procedure for the provision of information in the field of technical standards and regulations[12] and in the draft proposal for a Directive on the legal protection of services based on, or consisting of, conditional access)[13]. This definition encompasses a large number of very different economic activities which may be carried out on line. These include the following:

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12 OJ 204, 21.7.1998, p. 37, as amended by European Parliament and Council Directive 98/98/EC of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 217, 5.8.1998, p. 18.

13 Common position of the Council on the adoption of Directive 98/... of the European Parliament and of the Council concerning the legal protection of services based on, or consisting of, conditional access, OJ C 262, 19.8.1998, p. 34.

- a business to business or a business to consumer service;

- a service consisting of the sale of goods or services, as well as services which are free to the recipient (the funding often being secured by commercial[14]communications);

- services allowing for on-line electronic transactions of goods such interactive teleshopping, on-line shopping malls, etc. (the fact that the good is not delivered on-line does not imply that interactive teleshopping is not an Information Society service);

- a very wide *range of sectors and activities*, for example electronic newspapers, educational services, on-line encyclopaedias, sales services for certain products such as motor vehicles, tourism services, professional services (lawyers, doctors, chartered accountants, etc.), estate agents, virtual supermarkets, classified-advertisement services, BBS, job-search services, search engines, entertainment services, video-game services, services providing access to the World Wide Web, discussion forums, etc).

It is essential to cover all of these activities since all these services should be able to benefit from the internal market and, in legal terms, be guaranteed that they can develop without regard for frontiers; moreover, the development of the internet economy shows that the same service provider can supply a large number of services across frontiers.

3. Address the issues in the same instrument

Remaining obstacles must be addressed in the same instrument in order to cover the different stages of the economic activity of the relevant services. To be able to engage in such an activity it is necessary first of all to set up the business, carry out commercial communication activities, conclude contracts with customers, deal with any disputes involving liability and find procedures for resolving any disputes, etc. As the Commission indicated in its communication of 16 April 1997[15], it has identified the central elements in this economic chain requiring regulation at Community level to remove the cross-border obstacles to those activities.

It is essential that the various stages of the activities should be dealt with jointly in the same instrument enabling operators in practice to invoke the guarantee provided by the Directive so that there really are no frontiers affecting their activities. A Member State would otherwise remain able to adopt measures affecting one of those elements of a business's activities and thus frustrate the Community objective of achieving the proper functioning of the area without internal frontiers.

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14 The definition of a service does not require a payment by the recipient. In accordance with the caselaw of the Court of Justice, the concept of a service "normally provided for remuneration" (Article 60 of the Treaty which sets out what is meant by a service) does not make reference to specific means of financing a particular service "Art. 60 does not require the service to be paid for by those for whom it is performed."- Case C-352/85 para 16) but to the existence of an activity having an "economic character" or of "consideration (Case C-109/92, para 15).

15 See paragraphs 40 *et seq.* of Chapter 3.

Moreover, addressing the obstacles in the same instrument ensures coherence by grouping issues that are interdependent. The provisions of the Directive form a response to issues which must be considered as a whole because the proposed solutions are in most cases common to a large number of Information Society services and are interlinked.

4. Refrain from dealing with external aspects

Until an international regulatory framework is established, the Directive only covers service providers who are established in a Member State. It does not cover, at this stage, Information Society services provided by a person established in a third country[16]. In practice this has the following consequences:

- service providers who are not established in the *Community cannot exploit the opportunities afforded by the area without internal frontiers* guaranteed by the Directive. To do so, they must establish themselves in a Member State;

- This Directive does not prejudice:

  - the Community's international rights and obligations,

  - the results of the various discussions within international organisations on the legal aspects of electronic commerce.

This approach was adopted because the Directive has as its primary objective to ensure that the internal market functions properly and further because the Community is already participating actively in the various efforts to establish a global framework for the Information Society.

It is clear that the Internal Market approach followed in this Directive, and in particular the application of the country of origin rule, cannot be taken, at this stage, as a model for possible future international negotiations, in view of the fact that this approach can only be followed when a sufficient degree of legal integration exists.

5. Taking account of fundamental rights and liberties

Activities involved in Information Society services constitute both services within the meaning of Articles 59 and 60 of the Treaty and information within the scope of the principle of freedom of expression laid down in Article 10 of the European Convention on Human Rights. These activities may therefore qualify for protection under the principle of freedom to provide services, freedom of establishment and freedom of expression. This essential feature justifies the application of the principles of the internal market, in particular Article 3, according to which Member States are *prevented from restricting services* provided by a service provider established in another Member State who is already subject to control and to the legal system there.

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16 It should be noted that the geographical siting of the technology used is not to be taken into account; (the definition of "establishment" does not use criteria related to technology but to economic activity). Thus, Information Society services using technology in third countries, for example, hosting on a server, are covered if the service provider is established in the Community. Likewise, service providers established in a third country using a server in the Community are not covered by the Directive.

6. Establish a light, evolutionary and flexible framework

The Directive takes account of the fact that electronic commerce is at an early stage of its development, the need to avoid restricting that commerce by hasty and ill-adapted rules and the ability of parties to determine many of the issues themselves. Moreover, the directive relies upon the 'acquis' of a number of directives already adopted to achieve an Internal Market. Accordingly, the priority is not to develop a set of new rules, but rather on the one hand, to coordinate the amendment and modernisation of national law where it is not suited to electronic commerce and, on the other, to guarantee the effective and efficient application of existing rules. This explains, for example:

- the fact that the Directive focuses solely on the basic requirements which must be transposed by Member States irrespective of the categories or rules to which they will be anchored;

- the provisions which leave it to interested parties or the national authorities to adopt the *means of implementing* certain provisions of the directive. The directive *encourages the development of codes of conduct* at European level because numerous electronic commerce issues can be regulated by the interested parties themselves without there being any need for legal intervention;

- the fact that the directive, to account for the specific nature of certain areas or activities, foresees *exceptions to the internal market principles* in so far as they are justified by the jurisprudence of the European Court of Justice.

7. Ensure a high level of consumer protection

In view of the importance of electronic commerce for the European service industry and of the fact that its development is as yet in its initial stages, it is important that such commerce is not restricted and that its growth is promoted while effectively meeting general interest objectives such as consumer protection. Thus, the directive provides for a number of provisions which will reinforce the protection of consumers and increase their trust in new services in Europe, in particular:

- it will *lessen the risk of illegal activities* via the internet in Europe by establishing effective control by national authorities at the origin of the activity (in the Member States where the company in questions is established); it has the effect of making national authorities more responsible for their obligation to ensure the protection of the general interest not only within their borders but also throughout the Community and in the interests of citizens of other Member States;

- it imposes on operators *information and transparency obligations* upon operators which are indispensable for the consumer to take well-informed decisions;

- it establishes certain new guarantees as regards *contractual relations*, in particular the obligation to make available to users the means of correcting handling errors, the clarification of the moment of conclusion of electronic contracts, and the requirement that providers send a receipt;

- it guarantees *better redress systems* by promoting codes of conduct, by allowing the use of electronic our of court dispute settlement mechanisms (conciliation, arbitration), by facilitating efficient and fast legal redress, and by establishing contact points, at Member State level, to assist consumers.

Moreover, the directive leaves for Member States the possibilities of adopting, for consumer protection reasons and under certain conditions, measures restricting the free circulation of Information Society services, notably in the area of contracts concluded with consumers.

It should be noted that the Rome convention's criteria determining the law applicable to contractual obligations, which allow for derogations in favour of the consumer would be met, for example, in the case where the conclusion of the contract was preceded by a specific invitation by e-mail sent to the consumer's country and where the consumer undertook the steps necessary to conclude the contract in his country.

Finally, given the *speed* and geographic *scope* of damages caused by illegal internet activities, it is desirable that Member States allow for the act initiating a national Court action to be sent by appropriate electronic means and in a language other than that of the Member State of jurisdiction.

ANNEX: COMMENTARY ON INDIVIDUAL ARTICLES

CHAPTER I. GENERAL PROVISIONS

Article 1 Objective and scope

This Article clarifies the primary objective which is to ensure that, following the coming into force of this Directive, Information Society services will be able to fully benefit form, except under derogation, the free movement of services between the Member States. It also clarifies the scope of application particularly by indicating that the Community "acquis" is maintained.

Article 2 Definitions

Subparagraph (a) "Information Society service"

This definition was taken from Article 1(2) of Directive 98/34/EC[17]. In this Directive, in accordance with the definition of services laid down in Articles 59 and 60 of the Treaty, Information Society services are defined as "any service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". In addition, the Article defines the following terms:"at a distance", "by electronic means","at the individual request of a recipient of services".

It must be noted that the definition of Information Society services does not cover internet televised broadcasting when it solely represents an additional means of transmitting an integral or unaltered set of television programmes as defined in Article 1(a) of Directive 89/552/EC, which have been broadcast over the air, by cable or by satellite.

Subparagraph (b) "service provider"

This definition is based on Articles 59 and 60 of the Treaty and their interpretation by the case law of the Court of Justice. Any person providing an Information Society service constitutes a service provider. Service providers include the following:

- natural and legal persons;

- in the case of legal persons, all forms of company are included.

Subparagraph (c) "established service provider"

This definition makes it possible to determine the Member State in whose jurisdiction the Information Society service provider is situated. The definition adopted is based on the judgement of the Court of Justice which provided *that "the concept of establishment within the meaning of Article 52 et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an*

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[17] OJ L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC; OJ L 217, 5.8.1998, p. 18.

indefinite period"[18]. This definition is based on qualitative criteria concerning the actual nature and stability of the economic activity rather than formal criteria (a mere letter-box) or technology (establishment of technical means, etc.) which readily enable operators to evade supervision.

By focusing on the real nature of the activity, the definition, on the one hand, is sufficiently flexible to be applied by national authorities on a case-by-case basis, and, on the other, enables the Member State in which the service provider is established to exercise effective authority over it and, if necessary, to take measures or impose sanctions which will produce real effects.

Furthermore, it should be noted that the Court has recognised that the same operator can be established in several Member States. In such cases, the Court has had reason to clarify, in the field of television, that when there exist several establishments belonging to the same TV broadcasting organisation, the Member State with supervisory powers shall be the one where this organisation has the "centre of its activities"[19].

Thus, the following, for example, do not amount to an establishment on the territory of a Member State:

- *the location of the technology used*, e.g. the hosting of web pages or of a site;
- *the ability to access an internet site* in a Member State(any other approach would mean that an operator would be considered to be established in several or indeed fifteen Member States);
- the fact that a service provider established in another Member State offers *services targeted* at the territory of another Member State (in fact, the internal market enables businesses, particularly SMEs, to tailor their offers to specific niche markets in other Member States).

Subparagraph (d) "recipient of the service"

This definition is based on the definition of services within the meaning of Articles 59 and 60. The recipient is the person using a service, for example, a person using a service which consists of organising a discussion forum and leaving a message there.

Subparagraph (e) "commercial communications"

The proposed definition covers the various forms which commercial communications can take and is consistent with the Commission's new policy in this area set out in its communication entitled *"The follow-up to the Green Paper on commercial communications in the internal market"*[20].

The reference to direct and indirect promotion aims to prevent circumvention of the ban on commercial communications for certain products and services.

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18 Case C-221/89 [1991] ECR I-3905, paragraph 20.

19 Case C-56/96, [1997] ECR I-3143, paragraph 19.

20 COM(1998) 121 final, 4.3.1998.

In view of this wide definition and of the need for legal certainty, it has been specified that the promotion of a product, service or image of an enterprise created by a third party independently of that enterprise, for example, consumer-testing services, comparisons, or competitions for the best product or service, etc does not constitute commercial communication.

Given this definition, the following would not constitute commercial communications:

- mere *ownership* of a site;
- provision of information not constituting promotion;
- a hypertext link to a web site for commercial communications when it is created without any financial nexus to or any other consideration from the person owning the site (i.e. independent promotion);
- mention of the domain name or an e-mail address, logo or brand name when it is made without a financial nexus to or other consideration from the owner of the domain name, address, logo or brand name (i.e. independent promotion).

Subparagraph (f) "coordinated field"

This definition makes it possible to determine the national provisions in respect of which the Member States are to ensure compliance under Article 3. It therefore covers all requirements which may apply to a person acting as a provider of Information Society services or to Information Society services.

Article 3 Internal market

This Article has as its *objective* the implementation of the principle of freedom to provide services under Article 59 of the Treaty. This implementation is based, on the one hand, on determining the Member State responsible for ensuring the legality of the activities in an Information Society service and, on the other, on the prohibition on other Member States from restricting the freedom to provide these services.

Thus, paragraph 1 requires the Member State in which the service provider is established (as defined in Article 2) to ensure that his activities comply with the national law of the country (including, of-course, applicable Community regulation).

This provision does not seek to substitute either the 1980 Rome Convention on applicable law for contractual obligations or the 1968 Brussels Convention on judicial competence which continue to apply. Nor does the directive prejudice ongoing work on judicial competence in the context of the revision of the Brussels Convention.

Paragraph 2 prohibits in principle all forms of restriction to the freedom to provide Information Society services, i.e. any actions on the part of a Member State liable to hamper or otherwise make the free provision of services less attractive. However, possible exemptions from the principle are provided for in Article 22(2) and (3).

CHAPTER II - PRINCIPLES

Section 1: Establishment and information requirements

Article 4 Principle excluding prior authorisation

The *purpose* of this Article is to give effect to the principle of freedom to provide services by facilitating access to the supply of services on the internet. Thus, it establishes a sort of "right to a site" which can be exercised by any operator, company or self-employed person deciding to use the internet to provide a service.

Paragraph 1

The solution adopted has been to clarify the existing situation by asking Member States not to introduce any requirement of prior authorisation, though subject to paragraph 2. This is a qualitative obligation covering not only formal authorisation requirements but also any procedures which might have the same effect, such as, for example, the need to wait to receive a confirmation of receipt following a declaration.

Paragraph 2

Sub-paragraph (a) of this paragraph is to ensure that requirements for access to activities which are not specific to Information Society services continue to be applicable. Thus, for example, if legislation requires professional qualifications or authorisation by a professional body or authorisation to carry on the activities of a travel agency, it will continue to apply in full to any operator wishing to carry on such activities on the internet.

Sub-paragraph (b) covers general authorisation requirements and individual licenses established by directive 97/13/EC of 15 December 1997[21].

Article 5 General information to be provided

Paragraph 1

This paragraph refers more specifically to the information concerning the service provider. The obligation to supply information supplements those which exist in certain national laws and in Directive 97/7/EC on the protection of consumers in respect of distance contracts[22], which is specifically concerned with *contractual relationships*. Thus, even if there is no contract, the service provider will have to make available the information specified in this paragraph .

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21 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ L 117 , 7.5.1997 p. 15.

22 OJ L 144, 4.6.1997, p. 19.

The information in question must be *easily accessible* while the service is being provided. An icon or logo with a hypertext link to a page containing the information which is visible on all the site's pages would, for example, be sufficient to meet this requirement.

Paragraph 2

The information referred to in this paragraph is vital for protecting the consumer and other recipients of the service and for ensuring fair trading. A price indicated in Euros will meet this requirement.

Section 2: Commercial communications

Article 6 Information to be provided

Subparagraph (a) establishes the principle that the commercial communication must be clearly identifiable as such. This would be the case, for example, for a header the content of which left no doubt as to its nature. By contrast, identification would not be clear, for example, if the commercial communication is hidden, or in the case of an Article which praised the qualities of a product and was commissioned and financed by a commercial operator without that fact being mentioned, or again in the case of a site entirely sponsored by a private interest for the purposes of advertising, but not mentioning that fact.

Subparagraph (b) establishes that the person on whose behalf the commercial communication is carried out must be clearly identifiable. This would be the case, for example, if the banner carried the name of that person. In the case of commercial financing, an icon or logo with a hypertext link to a page containing the information which is visible on all the site's pages would, for example, be enough to meet this requirement. As regards banners, it must be clarified that a person for whom the commercial communication is undertaken need not be directly identified on the banner. For example, it would suffice if hypertext links to the banner allowed for such identification.

Subparagraph (c) establishes that promotional offers must be transparent. Such offers are not prohibited, but they must contain sufficient information so as not to leave any ambiguity as to their nature, and their conditions must be specifically indicated. In view of the possibilities which exist on the internet for supplying information, such a requirement will make it easier to protect the consumer and safeguard fair trading without imposing a significant financial burden on operators.

Subparagraph (d) requires transparency with regard to promotional competitions and games and stipulates that the conditions for taking part in them must be indicated, for example by means of an icon or logo with a hypertext link. The promotional competitions and games in question are those which serve the purpose of commercial communication and not gambling, which is excluded from the Directive's scope (Article 22(1)).

Article 7 Unsolicited commercial communication

This Article deals with "spamming" practices, i.e. the sending of unsolicited e-mail to consumers or discussion groups. The need to protect the consumer demands solutions over and above those which already exist in Article 10(2) of Directive 97/7/EC[23] and Article 12(2) of European Parliament and Council Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector.

This Article requires unsolicited communications to have a specific message on the envelope so that the recipient can instantly identify it as a commercial communication without having to open it.

Article 8 Regulated professions

Paragraph 1

This paragraph sets out the general principle that commercial communication is permitted for regulated professions to the extent necessary for these professions to be able to provide an Information Society service and provided it meets the professional rules of conduct applicable to them. Such rules exist in all Member States and in all professions and meet legitimate general interest objectives.

In practice, the issue for a service provider wishing to use the internet to offer services falling under the rules applicable to regulated professions or to carry out commercial communication in respect of those services is to determine what types of information may be communicated under the professional rules of practice relating to advertising.

Paragraph 2

Given the considerable differences of approaches prevailing and the fact that this sector has a tradition of self-regulation, it is intended *to encourage the bodies representing regulated professions at European level to identify the necessary adjustments and common solutions, in compliance with Community law,* in the interest of the professions themselves but also in the interest of consumers and the competent national authorities.

Two types of information merit particular attention from the bodies in question: the provision of information on *specialities and fees*. This information is vital to economic activity and to consumer protection. Other indications might also be important and merit examination, in particular, illustrations, photographs, logos; cases resolved with the agreement of customers; indication of names of customers; customer testimonials of services provided.

Paragraph 3

Finally, if necessary, the Commission might take action to define what types of information are compatible with the ethical rules of conduct in association with the Member States in the context of the Committee set up under Article 23.

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23 OJ L 144, 4.6.1997, p. 19.

Section 3: Electronic contracts

Article 9 Treatment of electronic contracts

Paragraph 1

This provision requires the Member States to make it possible in reality for electronic contracts to be used. It complements the proposal for a directive for a common framework for electronic signatures[24] which solely addresses the issue of the legal validity of electronic signatures without touching other aspects of the legal validity of electronic contracts. This means that the Member States have an *obligation to succeed,* carry out *a systematic review* of those rules which might prevent, limit or deter the use of electronic contracts and to carry out *this review in a qualitative way*, i.e. not seek simply to amend the key words in the rules (e.g. "paper") but to identify everything which might in practice prevent the "effective" use of electronic contracts.

The scope of the analysis to be carried out by the Member States covers all the stages of the contractual process, and not solely that of the actual conclusion of the contract, and the question of the medium used for the contract. The various stages of the contractual process are: the invitation to treat or the contract offer itself, negotiations, the offer (where there has been an invitation to enter into a contract), the conclusion of the contract, registration, cancellation or amendment of the contract, invoicing, archiving the contract.

In concrete terms, for the purposes of incorporating this Article into their legislation and enforcing the obligation, the Member States will have to:

- repeal provisions which manifestly prohibit or restrict the use of electronic media;
- not prevent the use of certain electronic systems as intelligent electronic agents;
- not give electronic contracts a weak legal effect, the result of which would be to favour in practice the use of paper contracts;
- adapt the formal requirements which cannot be met by electronic means or, as will more often be the case, which give rise to legal uncertainty because it is not certain how they are to be interpreted or applied to electronic contracts. This does not affect the requirement of a signature, which is already covered by the proposal for a Directive on a common framework for electronic signatures[25]. Legal uncertainty as to the interpretation of formal requirements is the most frequent obstacle to the effective use of electronic contracts. Examples of formal requirements which the Member States will have to examine and, where appropriate, amend are:

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[24] Proposal for a European Parliament and Council Directive on a common framework for electronic signatures; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions; COM(1998) 297 final, 13.5.1998.

[25] Proposal for a European Parliament and Council Directive on a common framework for electronic signatures; Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions; COM(1998) 297 final, 13.5.1998.

Requirements as to the medium used for the contractual process: that the contract be on "paper", that the contract be "written", that a "letter" (letter of confirmation, letter of intent) be sent, that a "document" be presented, that a specific "form" be used, that there be an "original copy" of the contract, that there be a certain number of "original copies" (e.g. one per person), that the contract be "printed" or "published".

Requirements as to human presence: that the contract be negotiated or concluded by natural persons or in the presence of both parties, that the contract be negotiated or concluded in a specific place.

Requirements as to the involvement of third parties: that the contract be prepared or authenticated by a notary, that the contract be concluded in the presence of witnesses, that the contract be registered or lodged with a person or authority.

As regards fiscal aspects of invoicing, it should be noted that specific measures at Community level will be necessary to remove the barriers that exist as a consequence of the divergence in requirements imposed at national level.

Paragraphs 2, 3 and 4

The purpose of these derogations is to introduce a degree of flexibility and to take account of situations when restrictions to the use of electronic contracts might be justified. They can also be adapted by implementing measures. Moreover, to ensure transparency, Member States are asked to indicate the types of contract which will be covered by this derogation.

Article 10 Information to be provided

In order to ensure a high standard of fair trading and consumer protection, this Article pursues an objective of transparency regarding the various stages of the contractual process, in particular the need to describe in advance what different steps are necessary before the formal conclusion of a contract. This aspect specific to the formation of electronic contracts is not dealt with by Directive 97/7/EC.

Paragraph 2 emphasises the importance of the quality of the act of consent.

Paragraph 3 aims to allow the recipient of the service to have access to relevant codes of conduct concerning contractual aspects that the service provider is subject to.

Article 11 Moment at which the contract is concluded

The Article addresses a specific situation:

- a contractual process in which the recipient of the service only has the choice of clicking "yes" or "no" (or the use of another technology) to accept or refuse an offer;

- a concrete offer made by a service provider (the situation in which the service provider only issues an invitation to offer is not covered).

In view of the significant degree of legal uncertainty surrounding this type of situation, the Article seeks to determine clearly the time at which a contract is concluded (paragraph 1). Paragraph 2 requires the service provider to put in place appropriate means for the recipient to be able to identify and correct handling errors, such as confirmation windows allowing him to be able to ensure that the recipient has indeed accepted his offer.

Section 4: Liability of intermediaries

This section establishes limitations on the liability of Information Society service providers, when they act as "intermediaries", as regards illegal acts initiated by others.

Only the activities involved in serving as on-line intermediaries are covered. These activities are characterised by: (i) the fact that the information is provided by recipients of the service and (ii) the fact that the information is transmitted or stored at the request of recipients of the service. The term "recipient" of the service should be understood to cover a person who places information on-line as well as a person who accesses and/or retrieves such information. The term "information" as used in this section should be understood in a broad sense.

Other types of activities which also constitute Information Society services are not addressed since no new problems specific to the internet have been identified as arising. Thus for example, the sale of plane tickets by an on-line travel agency (even if the agency sells the tickets on behalf of the airline company) cannot be considered as mere conduit or storage of information of third parties and therefore does not fall within the limitations established by this Directive.

Limitations to liability are established in a horizontal manner, i.e. they affect liability for all types of illegal activities initiated by third parties on line (e.g. copyright piracy, unfair competition practices, misleading advertising, etc.). It should be clear, however, that the provisions of this section do not affect the underlying material law governing the different infringements that may be concerned. This section is restricted to the establishment of the limitations on the liability. If a service provider fails to qualify for such limitations, the nature and scope of his liability will be established on the basis of Member States legislation.

The distinction as regards liability is not based on different categories of operators but on the specific types of activities undertaken by operators. The fact that a provider qualifies for an exemption from liability as regards a particular act does not provide him with an exemption for all of his other activities.

Article 12 Mere conduit

Article 12 establishes an exemption from liability as regards acts of transmission of information in communication networks where the service provider plays a passive role as a conduit of information for third parties (the recipients of the service).

This liability exemption covers both cases in which a service provider could be held directly liable for an infringement and cases in which a service provider could be considered secondarily liable for someone else's infringement (for instance as an accomplice). As regards the types of activities covered by this Article claims for damages

cannot be directed against the provider for any form of liability. Equally, the provider cannot be subject to prosecution in a criminal case. The Article does not exclude, however, the possibility of an action for injunctive relief.

Paragraph 1

The application of the exemption requires that the information transmitted is "provided by the recipient of the service". When the service provider is transmitting his own information he cannot be considered any longer as performing an intermediary - i.e. a "conduit"- activity. The same holds if the provider modifies the information itself during the course of the transmission.

To be granted an exemption from liability, three conditions must be fulfilled cumulatively.

The requirement that the provider does not initiate the transmission means that the provider is not the person who makes the decision to carry out the transmission. The fact that a provider automatically initiates a transmission at the request of a recipient of his service does not mean that the service provider initiated the transmission in this sense.

The requirement that the provider does not select the receivers of the transmission does not imply that the provider is disqualified from the exemption in the case of the selection of receivers as an automatic response to the request of the person initiating the transmission (e.g. a user's request to have an e-mail forwarded to a mailing list broker).

The third requirement is that the provider neither selects nor modifies the information contained in the transmission.

Paragraph 2

Intermediate and transient storage taking place during the transmission of the information in order to carry it out, is covered by the "mere conduit" exemption.

Only those acts of storage that take place during the course of transmitting the information and which do not serve any purpose other than the carrying out of the communication will benefit from the exemption. These acts of storage do not include copies made by the provider for the purpose of making the information available to subsequent users. Such acts will be addressed in Article 13.

The term "automatic" refers to the fact that the act of storage occurs through the ordinary operation of the technology. The term "intermediate" refers to the fact that the storage of information is made in the course of the transmission. The term "transient" refers to the fact that the storage is for a limited period of time. However, it should be clear that the information cannot be stored beyond the time that is reasonably necessary for the transmission.

Article 13 Caching

This Article addresses temporary forms of storage most often referred to as "system caching". This form of storage is undertaken by the service provider with a view to enhance the performance and the speed of digital networks. It does not constitute as such

a separate exploitation of the information transmitted. Thus, copies of the information, made available on line and transmitted by third parties, are temporarily kept in the operator's system or network for the purpose of facilitating the access of subsequent users to such information. Such copies are the result of a technical and automatic process and they are "intermediate" between the place in the network where the information was originally made available and the final user.

To benefit from an exemption for potential liability arising from this type of storage, the provider must respect certain conditions.

Article 14 Hosting

Paragraph 1

Article 14 establishes a limit on liability as regards the activity of storage of information provided by recipients of the service and at their request (e.g. the provision of server space for a company's or an individual's web site, for a BBS, a newsgroup, etc.).

The exemption from liability (both as regards civil and criminal liability) cannot be granted if a service provider knows that a user of his service is undertaking illegal activity (actual knowledge).

The exemption from liability, as regards claims for damages, cannot be granted if the service provider is aware of facts and circumstances from which the illegal activity is apparent.

Service providers will not lose the exemption from liability if after obtaining actual knowledge or becoming aware of facts and circumstances indicating illegal activity, they act expeditiously to remove or to disable access to the information.

This principle, established in the second indent of the paragraph, provides a basis on which different interested parties may lay down procedures for notifying the service provider about information that is the subject of illegal activity and for obtaining the removal or disablement of such information (sometimes referred to as "notice and take down procedures"). It should nevertheless be stressed that these procedures do not and cannot replace existing judicial remedies.

The Commission is actively encouraging industry self-regulatory systems, including the establishment of codes of conduct and hot line mechanisms[26].

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26 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions on an Action Plan on promoting safe use of the internet. Adopted by the Commission on 12 November 1997 (COM(97) 582).
Council Recommendation 98/560 of 24 September 1998 on the development of the competitiveness of the European audio-visual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity; OJ L 270, 7.10.1998, p. 48.

Paragraph 2

This paragraph establishes that if a recipient of the service acts under the authority or the control of the provider, Article 14 does not apply. It should be stressed that the relevant control is the control of the recipient's acts and not the control over the information as such.

Article 15 No obligation to monitor

This Article establishes that no general obligation should be imposed on providers to screen or to actively monitor third party content. This general rule does not affect the possibility of a court or law enforcement agency requesting a service provider to monitor, for instance, a specific site during a given period of time, in order to prevent or fighting specific illegal activity.

CHAPTER III - IMPLEMENTATION

The purpose of this Chapter is to ensure that the Directive is properly implemented in the interests of the public and service providers and it is justified by the need to ensure the proper functioning of the internal market, in particular the application of the principle of country of origin laid down by Article 3.

Article 16 Codes of conduct

This Article therefore encourages the creation of codes of conduct at European level. It is wholly consistent with the policy adopted at Community level both by Council Recommendation 98/560 of 24 September 1998[27] and with the Council Decision adopting a Multiannual Action Plan promoting safe use of the internet of ....

In order to ensure that these codes of conduct are consistent with Community law, subparagraph (b) encourages interested parties to inform the Commission of any draft codes. By contrast, under Directive 98/34/EC[28], voluntary agreements to which a public authority is party must be notified in accordance with the terms of the Directive.

This provisions will be particularly important for the implementation of certain other provisions, such as Article 8.

Article 17 Out-of-court dispute settlement

Paragraph 1

This Article establishes an obligation to allow effective recourse to these remedies, in particular by electronic means, where they comply with the principles set out in paragraph 2. This type of mechanism would appear particularly useful for some disputes on the internet because of their low transactional value and the size of the parties, who

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27 Recommendation on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ L 270, 7.10.1998, p. 48.

28 OJ L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC, OJ L 217, 5.8.1998 p. 18.

might otherwise be deterred from using legal procedures because of their cost. The legal framework of these dispute-settlement mechanisms in the Member States should not be such that it limits the use of these mechanisms or makes them unduly complicated. For example, in the case of specific mechanisms for disputes on the internet, these could take place electronically.

Paragraph 2

These principles apply solely to disputes concerning consumption and are already set out in Commission Recommendation 98/257/EC[29], adopted on 30 March 1998, on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and are explained in the Commission Communication of 30 March 1998 on the out-of-court settlement of consumer disputes[30].

Article 18 Court actions

This Article is concerned solely with issues which must be addressed to ensure the proper functioning of the internal market, and it is directly linked to the Community objective of guaranteeing the freedom to provide services as defined in Article 3 of the Directive, in particular by not calling into question the mutual confidence between Member States.

Paragraph 1 relates to *legal remedies in urgent cases* (e.g. applications for the adoption of interim measures). The Member States must take measures to make such remedies effectively available and will therefore have to examine whether their procedures are adapted to tackling illicit conduct or disputes on the internet.

Article 19 Cooperation between authorities

The purpose of this Article is to give national authorities the means of meeting their task of monitoring Information Society services and to ensure effective cooperation between Member States and between the Member States and the Commission.

Paragraph 4 requires Member States to set up within their administration contact points that can direct and assist the recipients of services, in particular consumers.

Article 20 Electronic media

The purpose of this Article is to allow implementing measures to be adopted concerning the electronic means which might be considered appropriate for the purposes of meeting the obligations which refer to such means of communication (Articles 17(1) and 19(4)). Such measures must be taken with a view to facilitating cross-border communications under adequately secure conditions.

Article 21 Sanctions

This is a standard provision for internal market Directives.

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29 OJ L 115, 17.4.1998, p. 31.

30 COM(1998) 198 final.

CHAPTER IV: EXCLUSIONS FROM SCOPE AND DEROGATIONS

Article 22 Exclusions and derogations

In view of its wide scope and the need to ensure a degree of flexibility and leeway in its application, the Directive provides for three types of derogation:

Paragraph 1: The general derogations to the scope of application cover *taxation* and the areas covered by directive 95/46/EC[31]. There could be certain interference between the latter and this Directive on electronic commerce. Given that directive 95/46/EC already ensures the free circulation of personal data between the Member States, the area it covers has been excluded from the scope of application of this Directive. The fiscal aspects of electronic commerce are also excluded and are under review in the work that has been launched by the Commission Communication "Electronic commerce and indirect taxation"[32].

Moreover, certain activities listed in Annex I are also excluded because it is not possible to guarantee the freedom to provide services between Member States given the lack of mutual recognition or sufficient harmonisation to guarantee an equivalent level of protection of general interest objectives.

Paragraph 2: derogation from the internal market clause:

The country of origin principle, as envisaged in this Directive, requires certain derogations in the specific cases cited in Annex II. Indeed, certain specific areas cannot benefit from the country of origin principle because in these fields:

- it is *impossible to apply the principle of mutual recognition* as set out in the case-law of the Court of Justice concerning the principles of freedom of movement enshrined in the Treaty, or

- it is an area where mutual recognition cannot be achieved and there is *insufficient harmonisation* to guarantee an equivalent level of protection between Member States,

- there are *provisions laid down by existing Directives which are clearly incompatible* with Article 3 because they explicitly require supervision in the country of destination.

Paragraph 3: derogations from the freedom to provide services in specific cases.

Paragraph 3 allows measures to be taken in very specific cases to restrict the freedom to provide Information Society services which would normally be considered incompatible with Article 3(2).

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31 Directive 95/46/EC already guarantees the free circulation of personal data between Member States, it's ambit is excluded from the scope of application of the present Directive, OJ L 281, 23.11.1995, p. 31.

32 COM(1998) 374 final.

These derogations are subject to a series of conditions relating to the measures' characteristics (subparagraph (a)) and the conduct of the Member State taking them (subparagraph (b)).

Moreover, an emergency procedure has been devised to take account of the speed at which loss and damage can occur.

Moreover, the derogations are subject to a supervision procedure by the Commission. It goes without saying that the Commission's approach in this context will be flexible, and, in particular, will seek to avoid cases of disguised or disproportionate restrictions to the free movement of the relevant services. Having said this, the Commission will fully account for the Member States' need to enforce laws seeking to protect fundamental societal interests. It would, for example, be out of the question for the Commission to prevent a Member State from applying a law which would forbid the arrival of racist messages.

CHAPTER V: ADVISORY COMMITTEE AND FINAL PROVISIONS

Article 23 sets up the Consultative Committee charged with assisting the Commission in implementing its powers of enforcement. The subsequent Articles are standard for directives.

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on certain legal aspects of electronic commerce in the internal market

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on certain legal aspects of electronic commerce in the internal market

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57(2), 66 and 100a thereof,

Having regard to the proposal from the Commission[33],

Having regard to the opinion of the Economic and Social Committee[34],

Acting in accordance with the procedure referred to in Article 189b of the Treaty[35],

(1) Whereas the European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; whereas, in accordance with Article 7a of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods, services and the freedom of establishment are ensured; whereas the development of Information Society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples;

(2) Whereas the development of electronic commerce within the Information Society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies;

(3) Whereas Information Society services span a wide range of economic activities which can, in particular, consist of selling goods on line; whereas they are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information; whereas Information Society services also include on-line activities via telephony and telefax;

(4) Whereas the development of Information Society services within the Community is restricted by a number of legal obstacles to the proper functioning of the internal market which hamper or make less attractive the exercise of the freedom of establishment and the freedom to provide services; whereas these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; whereas, in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; whereas

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33 OJ C
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legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State;

(5) Whereas, in the light of Community objectives, of Articles 52 and 59 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; whereas, by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 3b of the Treaty;

(6) Whereas, in accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; whereas, where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular consumer protection and the protection of public health; whereas according to Article 129 of the Treaty, the protection of public health is an essential component of other Community policies; whereas this Directive does not impact on the legal requirements applicable to the delivery of goods as such, nor those applicable to services which are not Information Society services;

(7) Whereas this Directive does not aim to establish specific rules on international private law relating to conflicts of law or jurisdiction and is therefore without prejudice to the relevant international conventions;

(8) Whereas Information Society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; whereas, to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; whereas, moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such Information Society services should only be subject to the law of the Member State in which the service provider is established; whereas, in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State whence the services orginate;

(9) Whereas the place at which a service provider is established should be determined in accordance with the case-law of the Court of Justice; whereas the place of establishment of a company providing services via an internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible; whereas, where the same supplier has a number of establishments, the competent Member State will be the one in which the supplier has the centre of his activities; whereas in cases where it is particularly difficult to assess in which Member States the supplier is established, cooperative procedures should be established between the Member States and the consultative committee should be capable of being convened in urgent cases to examine such difficulties;

(10) Whereas commercial communications are essential for the financing of Information Society services and for developing a wide variety of new, charge-free services; whereas in the interests of consumer protection and fair trading,

commercial communications, including discounts, promotional offers and promotional competitions, must meet a number of transparency requirements and that these requirements are without prejudice to Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts[36]; whereas this Directive should not affect existing directives on commercial communications, in particular Directive 98/43/EC of the European Parliament and of the Council[37] on tobacco advertising;

(11) Whereas Article 10(2) of Directive 97/7/EC and Article 12(2) of European Parliament and Council Directive 97/66/EC of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector[38] address the issue of consent by receivers to certain forms of unsolicited commercial communication and are fully applicable to Information Society services;

(12) Whereas, in order to remove barriers to the development of cross-border services within the Community which professional practitioners might offer on the internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; whereas codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; whereas the drawing-up or, where appropriate, the adaptation of such rules should in the first place be encouraged by, rather than laid down in, this Directive; whereas the regulated professional activities governed by this Directive should be understood in the light of the definition set out in Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration[39];

(13) Whereas each Member State should amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means, subject to any Community measure in the field of taxation that could be adopted on electronic invoicing; whereas the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; whereas the result of this amendment should be to make contracts concluded electronically genuinely and effectively workable in law and in practice; whereas the legal effect of electronic signatures is dealt with by European Parliament and Council Directive 99/.../EC [on a common framework for electronic signatures][40]; whereas it is necessary to clarify at what point in time a contract entered into electronically is considered to be actually concluded; whereas the service recipient's agreement to enter into a contract may take the form of an on-line payment; whereas the acknowledgment of receipt by a service provider may take the form of the on-line provision of the service paid for;

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36 OJ L 144, 4.6.1997, p. 19.

37 OJ L 213, 30.7.1998, p. 9.

38 OJ L 24, 30.1.1998, p. 1.

39 OJ L 19, 24.1.1989, p. 16.

40 COM(1998) 297 final, 13.5.1998.

(14) Whereas, amongst others, Council Directive 93/13/EEC[41] regarding unfair contract terms and Directive 97/7/EC, form a vital element for protecting consumers in contractual matters; whereas those directives also apply in their entirety to Information Society services; whereas that same Community *acquis* also embraces Council Directive 84/450/EEC[42] on misleading advertising, as amended by European Parliament and Council Directive 97/55/EC[43], Council Directive 87/102/EEC[44] on consumer credit; as last amended by European Parliament and Council Directive 98/7/EC[45], Council Directive 90/314/EEC[46] on package travel, package holidays and package tours, and European Parliament and Council Directive 98/6/EC[47] on the indication of prices of products offered to consumers; whereas this Directive should be without prejudice to Directive 98/43/EC, adopted within the framework of the internal market, or to other directives on the protection of public health;

(15) Whereas the confidentiality of electronic messages is guaranteed by Article 5 of Directive 97/66/EC; whereas in accordance with that Directive Member States must prohibit any kind of interception or surveillance of such electronic messages by others than the senders and receivers;

(16) Whereas both existing and emerging disparities in Member States' legislation and case-law concerning civil and criminal liability of service providers acting as intermediaries prevent the smooth functioning of the Internal Market, in particular by impairing the development of cross-border services and producing distortions of competition; whereas service providers have a duty to act, under certain circumstances, with a view to preventing or ceasing illegal activities; whereas the provisions of this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; whereas such mechanisms could be developed on the basis of voluntary agreements between all parties concerned; whereas it is in the interest of all parties involved in the provision of Information Society services to adopt and implement such procedures; whereas the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification;

(17) Whereas each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; whereas the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders; whereas the bodies responsible for such out-of-court settlement of consumer disputes must comply with certain essential principles, as set out in

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41 OJ L 95, 21.4.1993, p. 29.
42 OJ L 250, 19.9.1984, p. 17.
43 OJ L 290, 23.10.1997, p. 18.
44 OJ L 42, 12.2.1987, p. 48.
45 OJ L 101, 1.4.1998, p. 17.
46 OJ L 158, 23.6.1990, p. 59.
47 OJ L 80, 18.3.1998, p. 27.

Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for such settlement of consumer disputes[48];

(18) Whereas it is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; whereas excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; whereas taxation, particularly value-added tax imposed on a large number of the services covered by this Directive, must be excluded from the scope of this Directive; whereas, in this respect, the Commission also intends to extend the application of the principle of taxation at source to the provision of services within the Internal Market, thus giving its approach a general coherence;

(19) Whereas as regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract;

(20) Whereas this Directive should not apply to services supplied by service providers established in a third country; whereas, in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; whereas this Directive is without prejudice to the results of discussions within international organisations (WTO, OECD, UNCITRAL) on legal issues; whereas this Directive should also be without prejudice to the discussions within the Global Business Dialogue which were launched on the basis of the Commission Communication of 4 February 1998 on "Globalisation and the Information Society - The need for strengthened international coordination"[49];

(21) Whereas the Member States need to ensure, that, when Community acts are transposed into national legislation, Community law is duly applied with the same effectiveness and thoroughness as national law;

(22) Whereas the adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the Information Society nor hinder cultural, and notably audiovisual, policy measures, which the Member States might adopt, in conformity with Community law, taking into account their linguistic diversity, national and regional specificities and their cultural heritage; whereas, in any case, the development of the Information Society must ensure that Community citizens can have access to the cultural European heritage provided in the digital environment;

(23) Whereas the Council, in its Resolution of 3 November 1998 on the consumer aspects of the Information Society, stressed that the protection of consumers deserved special attention in this field; whereas the Commission will examine the degree to which existing consumer protection rules provide insufficient protection

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48 OJ L 115, 17.4.1998, p. 31.

49 COM(98) 50 final.

in the context of the Information Society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; whereas, if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified;

(24) Whereas this Directive should be without prejudice to Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems[50], as amended by Regulation (EEC) No 3089/93[51].

(25) Whereas Commission Regulation (EC) No 2027/97[52] and the Warsaw Convention of 12 October 1929 place various obligations upon air carriers regarding the provision of information to their passengers, including information about the liability of the carrier; whereas this Directive is without prejudice to the requirements of those instruments,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive seeks to ensure the proper functioning of the internal market, particularly the free movement of Information Society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, national provisions on Information Society services relating to the internal market arrangements, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to Information Society services without prejudice to the existing level of protection for public health and consumer interests, as established by Community acts, including those adopted for the functioning of the Internal Market.

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50 OJ L 220, 29.7.1989, p. 1.

51 OJ L 278, 11.11.1993, p. 1.

52 OJ L 285, 17.10.1997, p. 1.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "*Information Society services*": any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services;

For the purpose of this definition:

- "at a distance" means that the service is provided without the parties being simultaneously present;
- "by electronic means" means that a service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- "at the individual request of a recipient of services" means a service provided through the transmission of data on individual request.

(b) "*service provider*": any natural or legal person providing an Information Society service;

(c) "*established service provider*": a service provider who effectively pursues an economic activity using a fixed establishment for an indeterminate duration. The presence and use of the technical means and technologies required to provide the service do not constitute an establishment of the provider;

(d) "*recipient of the service*": any natural or legal person who, for professional ends or otherwise, uses an Information Society service, in particular for the purposes of seeking information or making it accessible;

(e) "*commercial communications*": any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a liberal profession. The following do not as such constitute commercial communications:

- information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,
- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, in particular without financial consideration.

(f) "*coordinated field*": the requirements applicable to Information Society service providers and Information Society services.

Article 3

Internal market

1. Each Member State shall ensure that the Information Society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within this Directive's coordinated field.

2. Member States may not, for reasons falling within this Directive's coordinated field, restrict the freedom to provide Information Society services from another Member State.

3. Paragraph 1 shall cover the provisions set out in Articles 9, 10 and 11 only in so far as the law of the Member State applies by virtue of its rules of international private law.

CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall lay down in their legislation that access to the activity of Information Society service provider may not be made subject to prior authorisation or any other requirement the effect of which is to make such access dependent on a decision, measure or particular act by an authority.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at Information Society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council[53].

Article 5

General information to be provided

1. Member States shall lay down in their legislation that Information Society services shall render easily accessible, in a direct and permanent manner to their recipients and competent authorities, the following information:

   (a) the name of the service provider;

   (b) the address at which the service provider is established;

   (c) the particulars of the service provider, including his electronic-mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

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[53] OJ L 117, 7.5.1997, p. 15.

(d) where the service provider is registered in a trade register, the trade register in which the service provider is entered and his registration number in that register;

(e) where the activity is subject to an authorisation scheme, the activities covered by the authorisation granted to the service provider and the particulars of the authority providing such authorisation;

(f) as concerns the regulated professions:

- any professional body or similar institution with which the service provider is registered;

- the professional title granted in the Member State of establishment, the applicable professional rules in the Member State of establishment and the Member States in which the Information Society services are regularly provided;

(g) where the service provider undertakes an activity that is subject to VAT, the VAT number under which he is registered with his fiscal administration.

2. Member States shall lay down in their legislation that prices of Information Society services are to be indicated accurately and unequivocally.

Section 2 Commercial communications

Article 6

Information to be provided

Member States shall lay down in their legislation that commercial communication shall comply with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where authorised, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented accurately and unequivocally;

(d) promotional competitions or games, where authorised, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented accurately and unequivocally.

Article 7

Unsolicited commercial communication

Member States shall lay down in their legislation that unsolicited commercial communication by electronic mail must be clearly and unequivocally identifiable as such as soon as it is received by the recipient.

Article 8

Regulated professions

1. Member States shall lay down in their legislation relating to commercial communication by regulated professions that the provision of Information Society services is authorised provided that the professional rules regarding the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession are met.

2. Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of providing the Information Society service in conformity with the rules referred to in paragraph 1.

3. Where necessary in order to ensure the proper functioning of the internal market, and in the light of the codes of conduct applicable at Community level, the Commission may stipulate, in accordance with the procedure laid down in Article 23, the information referred to in paragraph 2.

Section 3 Electronic contracts

Article 9

Treatment of electronic contracts

1. Member States shall ensure that their legislation allows contracts to be concluded electronically. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither prevent the effective use of electronic contracts nor result in such contracts being deprived of legal effect and validity on account of their having been made electronically.

2. Member States may lay down that paragraph 1 shall not apply to the following contracts:

   (a) contracts requiring the involvement of a notary;

   (b) contracts which, in order to be valid, are required to be registered with a public authority;

   (c) contracts governed by family law;

   (d) contracts governed by the law of succession.

3. The list of categories of contract provided for in paragraph 2 may be amended by the Commission in accordance with the procedure laid down in Article 23.

4. Member States shall submit to the Commission a complete list of the categories of contracts covered by the derogations provided for in paragraph 2.

Article 10

Information to be provided

1. Member States shall lay down in their legislation that, except when otherwise agreed by professional persons, the manner of the formation of a contract by electronic means shall be explained by the service provider clearly and unequivocally, and prior to the conclusion of the contract. The information to be provided shall include, in particular:

   (a) the different stages to follow to conclude the contract;

   (b) whether or not the concluded contract will be filed and whether it will be accessible;

   (c) the expedients for correcting handling errors.

2. Member States shall provide in their legislation that the different steps to be followed for concluding a contract electronically shall be set out in such a way as to ensure that parties can give their full and informed consent.

3. Member States shall lay down in their legislation that, except when otherwise agreed by professional parties, the service providers shall indicate any codes of conduct to which they subscribe and information on how those codes can be consulted electronically.

Article 11

Moment at which the contract is concluded

1. Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, in cases where a recipient, in accepting a service provider's offer, is required to give his consent through technological means, such as clicking on an icon, the following principles apply:

   (a) the contract is concluded when the recipient of the service:

   - has received from the service provider, electronically, an acknowledgment of receipt of the recipient's acceptance, and

   - has confirmed receipt of the acknowledgment of receipt;

   (b) acknowledgment of receipt is deemed to be received and confirmation is deemed to have been given when the parties to whom they are addressed are able to access them;

   (c) acknowledgment of receipt by the service provider and confirmation of the service recipient shall be sent as quickly as possible.

2. Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, the service provider shall make available to the recipient of the service appropriate means allowing him to identify and correct handling errors.

Section 4 Liability of intermediaries

Article 12

Mere conduit

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by the recipient of the service, or the provision of access to a communication network, Member States shall provide in their legislation that the provider of such a service shall not be liable, otherwise than under a prohibitory injunction, for the information transmitted, on condition that the provider:

   (a) does not initiate the transmission;

   (b) does not select the receiver of the transmission; and

   (c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

Article 13

Caching

Where an Information Society service is provided that consists in the transmission in a communication network of information provided by a recipient of the service, Member States shall provide in their legislation that the provider shall not be liable, otherwise than under a prohibitory injunction, for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner consistent with industrial standards;

(d) the provider does not interfere with the technology, consistent with industrial standards, used to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to bar access to the information upon obtaining actual knowledge of one of the following:

- the information at the initial source of the transmission has been removed from the network;

- access to it has been barred;

- a competent authority has ordered such removal or barring.

Article 14

Hosting

1. Where an Information Society service is provided that consists in the storage of information provided by a recipient of the service, Member States shall provide in their legislation that the provider shall not be liable, otherwise than under a prohibitory injunction, for the information stored at the request of a recipient of the service, on condition that:

   (a) the provider does not have actual knowledge that the activity is illegal and, as regards claims for damages, is not aware of facts or circumstances from which illegal activity is apparent; or

   (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

Article 15

No obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Paragraph 1 shall not affect any targeted, temporary surveillance activities required by national judicial authorities in accordance with national legislation to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

CHAPTER III

IMPLEMENTATION

Article 16

Codes of conduct

1. Member States and the Commission shall encourage:

   (a) the drawing-up of codes of conduct at Community level, by trade and professional associations or organisations designed to contribute to the proper implementation of Articles 5 to 15;

(b) the transmission of draft codes of conduct at national or Community level to the Commission so that the latter may examine their compatibility with Community law;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by professional associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce.

2. In so far as they may be concerned, consumer associations shall be involved in the drafting and implementation of codes of conduct drawn up according to point (a) of paragraph 1.

Article 17

Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an Information Society service provider and its recipient, their legislation allows the effective use of out-of-court schemes fsor dispute settlement, including appropriate electronic means.

2. Member States shall ensure that bodies responsible for the out-of-court settlement of consumer disputes apply, whilst abiding by Community law, the principles of independence and transparency, of adversarial techniques, procedural efficacy, legality of the decision, and freedom of the parties and of representation.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the decisions they take regarding Information Society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18

Court actions

1. Member States shall ensure that effective court actions can be brought against Information Society services' activities, by allowing the rapid adoption of interim measures designed to remedy any alleged infringement and to prevent any further impairment of the interests involved.

2. Acts in breach of the national provisions incorporating Articles 5 to 15 of this Directive which affect consumers' interests shall constitute infringements within the meaning of Article 1(2) of Directive 98/27/EC of the European Parliament and Council[54].

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54 OJ L 166, 11.6.1998, p. 51.

Article 19

Cooperation between authorities

1. Member States shall ensure that their competent authorities have the appropriate powers of supervision and investigation necessary to implement this Directive effectively and that service providers supply those authorities with the requisite information.

2. Member States shall ensure that their national authorities cooperate with the authorities of other Member States; they shall, to that end, appoint a contact person, whose coordinates they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, provide the assistance and information requested by authorities of other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish, within their administration, contact points which shall be accessible electronically and from which recipients and service providers may:

   (a) obtain information on their contractual rights and obligations;

   (b) obtain the particulars of authorities, associations or organisations from which recipients of services may obtain information about their rights or with whom they may file complaints; and

   (c) receive assistance in the event of disputes.

5. Member States shall ensure that their competent authorities inform the Commission of any administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce.

6. The rules governing cooperation between national authorities as referred to in paragraphs 2 to 5 shall be laid down by the Commission in accordance with the procedure set out in Article 23.

7. Member States may ask the Commission to convene urgently the committee referred to in Article 23 in order to examine difficulties over the application of Article 3(1).

Article 20

Electronic media

The Commission may take measures, in accordance with the procedure provided for in Article 23, to ensure the proper functioning of electronic media between Member States, as referred to in Articles 17(1) and 19(3) and (4).

Article 21

Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive. Member States shall notify these measures to the Commission no later than the date specified in Article 25 and shall inform it of all subsequent amendments to those measures without delay.

CHAPTER IV

EXCLUSIONS FROM SCOPE AND DEROGATIONS

Article 22

Exclusions and derogations

1. This Directive shall not apply to:

   (a) taxation;

   (b) the field covered by Directive 95/46/EC of the European Parliament and of the Council[55];

   (c) the activities of Information Society services referred to in Annex I. This list of activities may be amended by the Commission in accordance with the procedure laid down by Article 23.

2. Article 3 shall not apply to the fields referred to in Annex II.

3. By way of derogation from Article 3(2), and without prejudice to court action, the competent authorities of Member States may take such measures restricting the freedom to provide an Information Society service as are consistent with Community law and with the following provisions:

   (a) the measures shall be:

      (i) necessary for one of the following reasons:

         - public policy, in particular the protection of minors, or the fight against any incitement to hatred on grounds of race, sex, religion or nationality,

         - the protection of public health,

         - public security,

         - consumer protection;

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55 OJ L 281, 23.11.1995, p. 31.

(ii) taken against an Information Society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives,

(iii) proportionate to those objectives;

(b) prior to taking the measures in question, the Member State has:

- asked the Member State referred to in Article 3(1) to take measures and the latter did not take such measures, or the latter were inadequate;

- notified the Commission and the Member State in which the service provider is established of its intention to take such measures;

(c) Member States may lay down in their legislation that, in the case of urgency, the conditions stipulated in point (b) do not apply. Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State in which the service provider is established, indicating the reasons for which the Member State considers that there is urgency.

(d) the Commission may decide on the compatibility of the measures with Community law. Where it adopts a negative decision, the Member States shall refrain from taking any proposed measures or shall be required to urgently put an end to the measures in question.

CHAPTER V

ADVISORY COMMITTEE AND FINAL PROVISIONS

Article 23

Committee

The Commission shall be assisted by a committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time-limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

Article 24

Re-examination

Not later than three years after the adoption of this Directive, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to developments in the field of Information Society services.

Article 25

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within one year of its entry into force. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 26

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 27

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX I

Activities excluded from the scope of application of the Directive

Information Society services' activities, as referred to in Article 22(1), which are not covered by this Directive:

- the activities of notaries;
- the representation of a client and defence of his interests before the courts;
- gambling activities, excluding those carried out for commercial communication purposes.

ANNEX II

Derogations from Article 3

As referred to in Article 22(2) in which Article 3 does not apply:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC[56] and Directive 96/9/EC[57] as well as industrial property rights;
- the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 7(1) of Directive .../../EC[58];
- Article 44 paragraph 2 of Directive 85/611/EEC[59];
- Article 30 and Title IV of Directive 92/49/EEC[60], Title IV of Directive 92/96/EEC[61], Articles 7 and 8 of Directive 88/357/EEC[62] and Article 4 of Directive 90/619/EEC[63];
- contractual obligations concerning consumer contracts;
- unsolicited commercial communications by electronic mail, or by an equivalent individual communication.

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56 Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products; OJ L 24, 27.1.1987, p. 36.

57 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; OJ L 77, 27.3.1996, p. 20.

58 European Parliament and Council Directive ../.../EC of ..... [on the taking up and the prudential supervision of the business of electronic money instituions].

59 Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertaking for collective investment in transferable securities (UCITS), OJ L 375, 31.12.1985, p. 3, as last amended by Directive 95/26/EC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).

60 Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) OJ L 228, 11.8.1992, p. 1, as amended by Directive 95/26/EC.

61 Council Directive 92/56/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life insurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), OJ L 360, 9.12.1992, p. 1, as amended by Directive 95/26/EC.

62 Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ L 172, 4.7.1988, p. 1, as last amended by Directive 92/49/EC.

63 Council Directive of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ L 330, 29.11.1990, p. 50, as amended by Directive 92/96/EEC.

FINANCIAL STATEMENT

1. TITLE OF OPERATION

Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce.

2. BUDGET HEADINGS INVOLVED

None, administrative expenditures only.

3. LEGAL BASIS

Articles 57-66 and 100a of the Treaty establishing the European Community or following the entry into force of the Treaty of Amsterdam: Articles: 47-55 and 95.

4. DESCRIPTION OF THE OPERATION

4.1 General objective

Electronic commerce offers the Community a unique opportunity for economic growth, to improve European industry's competitiveness and to stimulate investment in innovation and the creation of new jobs. But such benefits will not be optimised unless the many legal obstacles which remain to the on-line provision of services (particularly important for cross border trade and for SMEs) are eliminated. The present proposal seeks to remove such obstacles thereby allowing our citizens and our industry to benefit in full from the development of electronic commerce in Europe.

The Commission's 1997 Communication on electronic commerce[64] set a clear objective of creating a coherent European legal framework by the year 2000. This proposal meets that objective. It builds upon and completes a number of other initiatives[65] that, together, will eliminate the remaining legal obstacles, while ensuring that general interest objectives are met, particularly the achievement of a high level of consumer protection. The proposal is also fully consistent with the work being undertaken at international level: the Community will thus secure a major role in international negotiations and significantly contribute to the establishment of a global policy for electronic commerce.

The proposal is based on the orientations set out by the Commission in the 1997 Communication. It provides a light, enabling and flexible approach. Particular attention has been paid both to the special nature of the internet and to the role of interested parties and of self-regulation. The proposal meets the principles of subsidiarity and proportionality by covering only those issues where a Community initiative is indispensable. These issues, which were also identified in the Commission's 1997

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64 "A European Initiative on Electronic Commerce", COM(97) 157 final of 16 April 1997.

65 Amongst the most recent are the directives on the "regulatory transparency mechanism", the protection of personal data, the protection of consumers in respect of contracts negotiated at a distance; and the proposals on the legal protection of conditional access services, electronic signatures, copyright and related rights and electronic money.

Communication, have been subsequently endorsed by the European Parliament[66]. They are the subject of work at Member State and international level and are being discussed by industry and other interested parties.

At present, there is uncertainty in a number of areas about how existing legislation can be applied to the on-line provision of services. There is divergent national legislation already in place or currently being discussed. Furthermore, diverging jurisprudence is emerging. The proposal therefore seeks to remove the obstacles that result from such conditions by tackling five key issues that together form a coherent framework to bring about the free circulation of on-line services. These issues are all inter-related because obstacles to electronic commerce services can arise at each step of the economic activity (from the promotion and the sale of a good or service to the settlement of disputes) and because none of these obstacles can be removed in isolation (for example, clarifying a service provider's liability is not possible without defining its place of establishment). Accordingly, the European Parliament, in its recent resolution, has asked the Commission to speed up the process of presenting a proposal for a directive which would address these issues in a coherent way.

These five issues are the following:

(1) Establishment of Information Society service providers

(2) Commercial communications (advertising, direct marketing, etc.)

(3) On-line conclusion of contracts

(4) Liability of intermediaries

(5) Implementation

4.2 Period covered and arrangements for renewal

Unspecified.

5. CLASSIFICATION OF EXPENDITURE

6. TYPE OF EXPENDITURE

7. FINANCIAL IMPACT (on Part B)

None

8. RAUD PREVENTION MEASURES

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66 European Parliament Resolution A4-0173/98 on the Communication from the Commission on "A European Initiative on Electronic Commerce", 14 May 1998.

9. ELEMENTS OF COST-EFFECTIVENESS ANALYSIS

9.1 Specific and quantifiable objectives; target population

The aim of the proposed Directive on legal aspects of electronic commerce is to safeguard and facilitate the functioning of the internal market in particular by facilitating the cross border provisions of on-line services in the Community.

The potential growth in this market is partially reflected in existing trends. In 1997 USD 1 billion of electronic commerce originated from Europe (global figure USD 7 billion) and the forecast on current trends is that this will increase to USD 30 billion by 2001. It should be noted that any such forecasts are based on the current fragmented regulatory framework and that they therefore under-represent the true potential for growth that could be achieved if the current proposed Directive were transposed into national laws. Investment in the new service sector will increase if development prospects at Community level are assured.

9.2 Grounds for the operation

The Directive takes account of the fact that electronic commerce is at an early stage of its development, the need to avoid restricting that commerce by hasty and ill-adapted rules and the ability of parties to determine many issues themselves. Therefore the directive establishes a light, developing and flexible approach. In this context, instead of regulating every detail, the Directive provides, in certain cases, that the Commission could adopt implementing measures under the committee procedure. The proposed Directive further provides for the creation of a Committee whose consultations will be obligatory (Article 22).

9.3 Monitoring and evaluation of the operation

Article 23 of the proposed Directive on certain legal aspects of electronic commerce provides for the Commission to report to the Parliament and the Economic and Social Committee no later than three years after the adoption of the proposed directive, and thereafter every two years on the results of applying the Directive. The Commission will report to the Parliament and the Economic and Social Committee through service papers made by the staff assigned to the administration of the operation. Any proposals for adjusting the proposed system could be put forward at that time.

10. ADMINISTRATIVE EXPENDITURE (PART A OF SECTION III OF THE GENERAL BUDGET)

Actual mobilisation of the necessary administrative resources will depend on the Commission's annual decision on the allocation of resources, taking into account the number of staff and additional amounts authorised by the budget authority.

10.1 Impact on the number of posts

Type of post		Staff to be assigned to the administration of the operation		Of which		Duration
		Permanent posts	Temporary posts	Use of existing resources within the DG or department concerned	Use of additional resources	
Officials or temporary staff	A	1		1		Indefinite
	B	0.5		0.5		
	C	0.5		0.5		
Other resources						
Total		2		2		

10.2 Overall financial impact of the additional human resources

By using existing resources being assigned to manage the operation 2.0 men/year x EC 108 000 = ECU 216 000 (calculation based upon Chapters A-1, A-2, A-4, A-5 and A-7).

(in KECU)

Type of post		Staff to be assigned to the administration of the operation		Amount
		Permanent posts	Temporary posts	
Officials or temporary staff	A	1 x 108		108
	B	0.5 x 108		54
	C	0.5 x 108		54
Other				
Total		2.0 x 108		216

10.3 Increase in other administrative expenditure arising from the operation

(in kECU)

Budget heading (No and title)	Amount	Method of calculation
A – 7031, meetings Committees whose consultation is compulsory	19.5	A maximum of two meetings a year 15 Member States x ECU 650 x 2 = 19.500.
A – 701 Mission expenses	9.75	One day visit of each EU capital = ECU 650 x 15 capitals = ECU 9.750 per year. The proposed Directive deals with issues covered by different national ministries in each Member State. At least one annual bilateral meeting with these ministries, in their capitals, is anticipated.
Total	29.25	

Credits will be found within the existing envelope given to DG XV.

IMPACT ASSESSMENT FORM

Title of proposal: Proposal for a Directive on certain legal aspects of electronic commerce.

Document Reference No:

The proposal

1. *Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?*

   The analysis undertaken by the Commission's services has demonstrated that:

   (i) the greatest part of the potential growth in investment and employment that electronic commerce can yield is associated with cross-border trade;

   (ii) since a Web site can be seen across the Community, the key economic barrier that undermines confidence in investing in on-line activities are the significant legal search costs arising from having to account for the differing laws in the Member States;

   (iii) this regulatory fragmentation problem can only be addressed by a European initiative which covers the entire economic chain involved in the execution of a trade.

   Furthermore, the legal barriers identified in the text consist of existing laws. It follows that they could not be removed through, for example, sole reliance on European self-regulation.

   It follows that in order to establish the Internal Market in the area of electronic commerce such that the potential economic growth and consumer choice that this new form of trade offers can be exploited, a harmonising directive with a cope covering all Information Society services and the entire economic chain is required.

The impact on business

2. *Who will be affected by the proposal?*

   - *Which sectors of business?*

   There is evidence and analysis to show that all sectors of business and all parts of their value-added chains could benefit from electronic commerce. By removing the legal uncertainty that undermines the exploitation of these benefits this proposal should help any company in any sector seeking to develop an Information Society service to do so.

   - *Which sizes of business (what is the concentration of small and medium-sized firms)?*

   All sizes of business will benefit from the proposal because it addresses a problem which they all face. However, it will be particularly beneficial to small companies.

This is because the significant legal search costs (equivalent in absolute level for all companies in a same sector) required to evaluate the current fragmented European regulatory framework represent a far higher burden as a proportion of revenue of a small company than for a large one. There is evidence from a survey in a DG XV sponsored newsletter (the newsletter survey) that these search costs are so great for some small companies that they have decided not to launch innovative projects in this area because of these cost burdens. It is by removing these excessive legal search costs arising from the present regulatory uncertainty that many small firms will be encouraged to enter into electronic commerce and for the first time will therefore be able to enter into cross-border trade within the Internal Market. Finally, it should be added that many micro companies (self-employed independent operators) will launch into electronic commerce thanks to the clarity and investment friendly regulatory framework in Europe that this proposal offers.

- *Are there particular geographical areas of the Community where the businesses are found?*

No, this will help businesses in all areas of the Community.

4. *What economic effects is the proposal likely to have?*

On employment?

It is impossible to forecast the employment growth that could result from this proposal. However, it is clear that the present regulatory fragmentation that this proposal addresses stifles innovation and plays to the advantage of a few big players in certain service areas who may simply use electronic commerce as a means to cut sales forces in existing service lines. Moreover, it is clear that investment in electronic commerce is, by the nature of the technology it relies on, the most foot-loose that exists. Thus, unless this proposal is adopted there is a risk that jobs will be created in electronic commerce in more investment friendly environments in third countries to serve the European market and that the few examples of electronic commerce in Europe will reduce rather than increase employment.

The present proposal ensures the opposite. It facilitates entry, encourages innovation and therefore helps create employment (See Section III of Annex).

On investment and the creation of new businesses?

The proposal will encourage the launching of new Information Society services and investment in Europe. By reducing compliance costs (you have to comply with the rules of your country of origin rather than all fifteen sets of national rules) it ensures that small innovative firms will look to Europe to launch their on-line services. It also encourages innovation because it does not lead to a situation where companies design their new Information Society service to be compatible with the most restrictive (but not necessarily most effective) of the fifteen existing European laws.

On the competitive position of businesses?

The proposal again has a strong positive effect. By stimulating competition through facilitating entry in the market by small innovative firms, European electronic commerce suppliers will be internationally competitive in what is a truly global market.

Consultation

The proposal itself has not been circulated to interested parties since the Commission still has to adopt it. However, in response to the Commission Communication on "A European Initiative in Electronic Commerce" (COM(97) 157 final) the European Parliament and the Economic and Social Committee both supported the principle of such a horizontal European harmonisation initiative based on an Internal Market approach proposed in the Communication to address the problems listed above.

Moreover, the newsletter survey mentioned above has given further evidence of the significance of the Internal Market problems that need to be addressed. Informal bilateral contacts with interested parties including the regulated professions have also resulted in favourable reactions to the approach detailed in the current proposal.

ISSN 0254-1475

COM(98) 586 final

DOCUMENTS

EN **06 10 15**

Catalogue number : CB-CO-98-685-EN-C

Office for Official Publications of the European Communities

L-2985 Luxembourg