



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.08.1999  
COM(1999)427 final

98/0325 (COD)

Amended proposal for a

**EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE**

**on certain legal aspects of electronic commerce in the Internal Market**

(presented by the Commission pursuant to Article 250 (2)  
of the EC-Treaty)

## EXPLANATORY MEMORANDUM

### 1. BACKGROUND

On 18 November 1998, the Commission adopted a proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market<sup>1</sup>. The proposal was transmitted to the Parliament and the Council on 23 December 1998. On 29 April 1999<sup>2</sup> the Economic and Social Committee gave its opinion on the proposal. The European Parliament, consulted under the co-decision procedure, proceeded to examine the proposal in the Committee on Legal Affairs and Citizens' Rights (responsible for the report), the Committee on Economic and Monetary Affairs and Industrial Policy, the Committee on the Environment, Public Health and Consumer Protection and the Committee on Culture, Youth, Education and the Media (committees for opinion). The Legal Affairs Committee, after receiving and considering the opinions of the three other Committees (adopted on 18 March 1999, 16 March 1999 and 24 March 1999 respectively), voted unanimously its report on 22 April 1999. The Parliament adopted its opinion<sup>3</sup> in the plenary session of 6 May 1999 approving the Commission's proposal subject to Parliament's amendments and calling on the Commission to, pursuant to Article 250(2) of the EC Treaty, alter its proposal accordingly.

### 2. THE AMENDED PROPOSAL

In general terms, the Parliament supports the approach and the main orientations of the Commission's proposal. This is particularly important as regards the clear and strong support it gives to the Internal Market principles underlying the proposal.

The amendments proposed by the Parliament are largely of a technical nature. The Commission accepts the majority in whole or in part, and in some cases subject to drafting modifications.

#### 2.1. Amendments accepted as such

The amendments proposed by the Parliament which have been accepted by the Commission and incorporated, without any changes, in the amended proposal relate to:

##### 2.1.1. Amendments to recitals

#### **Amendments concerning the effects of the proposal:**

- *Recital 2* has been amended to reflect amendment 1 stressing that the development of e-commerce can enhance the competitiveness of European industry.

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<sup>1</sup> COM (1998) 586 final of 18.11.1998, OJ C 30, 5.2.1999, p. 4.

<sup>2</sup> OJ C 169, 16.6.1999.

<sup>3</sup> EP Report (A4-0248/99) of 6.5.1999.

- A *new recital 2a* has been introduced to incorporate in the text amendment 2 noting that the EC legal framework will foster the development of Information Society services to the benefit of European citizens and operators.
- A *new recital 16b* has been introduced to incorporate in the text amendment 18 stressing the balanced approach of the Directive and the fact that it establishes principles upon which industry agreements can be based.
- A *new recital 22a* has been introduced to incorporate in the text amendment 20 emphasising that e-commerce is an opportunity to provide public services in the cultural, educational and linguistic fields.

**Amendments concerning the objective and principles underlying the proposal:**

- A *new recital 2b* has been introduced to incorporate in the text amendment 24 noting that the free movement of Information Society services can be a reflection of the freedom of expression enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- A *new recital 4a* has been introduced to incorporate in the text amendment 4 concerning the need to ensure a high level of Community integration in the area of e-commerce.
- A *new recital 16c* has been introduced to incorporate in the text amendment 16 stressing the need to guarantee effective access to redress mechanisms including the availability of appropriate court actions and the need to examine the possibility to provide access to judicial procedures by appropriate electronic means.

**Amendments clarifying certain aspects of the proposal:**

- *Recital 6* has been amended to reflect amendment 7 adding a reference to the protection of minors and human dignity to the list of general interest objectives mentioned in that recital.
- A *new recital 9a* has been introduced to incorporate in the text amendment 17 aiming at further clarifying the definition of "recipient of a service" established in article 2(d).
- *Recital 14* has been amended to reflect amendment 12 noting that the proposal is without prejudice to Directive 92/28 on the advertising of medical products for human use.
- *Recital 15* has been amended to reflect amendment 13 stating that to ensure the confidentiality of electronic messages Member States should abstain from prohibiting or restricting the use of cryptographic methods or similar tools.

**Amendments concerning the international dimension of electronic commerce:**

- A *new recital 20b* has been introduced to incorporate in the text amendment 6 concerning the need to ensure a clear legal framework consistent with the rules applicable at international level.

- A new recital 20c has been introduced to incorporate in the text amendment 19 on the need to co-operate at global level to make the legal frameworks of the EU and third countries compatible.
- A new recital 20d has been introduced to incorporate in the text amendment 22 stressing the need to reinforce co-operation in particular with EU applicant countries and with the Union's transatlantic partners.

#### *2.1.2. Amendments to articles*

##### **Article 2**

- A definition of the term "consumer" has been added in article 2(f) to reflect amendment 32.

##### **Article 5**

- A reference to Directive 97/7 (distance selling Directive) has been added in article 5 (1) to reflect amendment 33.
- Article 5(2) has been modified to reflect amendment 34 clarifying the obligation to indicate accurately and unequivocally prices and other terms and conditions.

##### **Article 6**

- A reference to Directive 97/7 (distance selling Directive) has been added in article 6 to reflect amendment 37.

##### **Article 9**

- The possibility for the Commission to review the list of categories of contracts in article 9(2) on the basis of comitology (article 9(3)) has been deleted to reflect amendment 40.

##### **Title section 4**

- The title of Section 4 has been redrafted to reflect amendment 43.

##### **Article 16**

- The need to involve consumer associations in the establishment of codes of conduct is reflected in article 16.1 (a) and 16.1 (d) following amendments 55 and 56.
- A reference to codes of conduct regarding the protection of minors and human dignity has been included (article 16.1 (e) to reflect amendment 57.

##### **Article 22**

- It has been clarified in art. 22.1 that the exclusion of the field covered by the data protection Directive from the scope of application of this Directive covers also

Directive 97/66 on the protection of personal data in the field of telecommunications following amendment 62.

#### **Article 24**

- Art. 24.1 has been modified to include a request that the report on the application of the Directive contains statistical results and takes account of the developments in the field of digital technologies. This is to reflect amendments 65 and 66.
- A new article 24.2 has been included requesting that the report on the application of the Directive considers the need to address the question of liability of providers of search engines and hyperlinks. This reflects amendment 67.

#### **2.2. Amendments accepted subject to modification**

The following amendments proposed by Parliament have been accepted by the Commission, fully or partly, subject to modification generally of a drafting nature and/or accompanied by further clarification:

##### **2.2.1. Amendments to recitals**

#### **Amendments concerning the effect of the proposal:**

- A new recital 5a has been introduced to incorporate in the text amendment 3 on the need to lay down an Internal Market legal framework to ensure legal certainty and consumer confidence. The drafting has been slightly changed to ensure coherence with the title of the proposal.

#### **Amendments concerning the objective and principles underlying the proposal:**

- Recital 16 has been modified to reflect the part of amendment 14 stressing the need for Member States to encourage self regulation and redrafting the last sentence of the recital.
- A new recital 17a has been introduced to incorporate in the text amendment 25 stressing that restrictions to the free movement of Information Society services must be in conformity with Community law and be necessary to achieve specific public interest objectives.

#### **Amendments clarifying certain aspects of the proposal:**

- Recital 7 has been redrafted to reflect amendment 9 aiming at deleting part of recital 7 in order to ensure that the legal principle of precedence of Community law is not put into question by international private law. For the sake of clarity the last part of recital 7 has been redrafted rather than deleted.
- Recital 11 has been modified to take account of amendment 11 which is closely linked to amendment 38 (see below comments on amendment 38 regarding article 7).

- A *new recital 16a* has been introduced to incorporate in the text amendment 15 stressing the importance of the proposed copyright Directive and the proposed e-commerce Directive coming into force within a similar time scale.

#### **Amendments concerning the international dimension of electronic commerce:**

- A *new recital 20a* has been introduced to incorporate in the text amendment 5 on the need to co-ordinate national regulatory measures at EU level to avoid a fragmentation of the Internal Market and to have a strong negotiating position at international level. The drafting has been modified to make clear that the establishment of a EU legal framework will contribute to the EU having a strong negotiating position at international level.

#### *2.2.2. Amendments to articles*

##### **Article 2**

- The definition of "Information Society service" established in article 2 (a), which reflects literally the definition already established in Directive 98/34, has been replaced by a direct reference to that Directive. This was requested by amendment 29 and is accepted as it clarifies that the concept of "Information Society service" is already part of the "acquis communautaire". In order to further explain the scope of the definition of "Information Society service" a new recital (*recital 2c*) and an addition to *recital 3* have been included in the proposal.

##### **Article 7**

- Amendment 38 deals with the issue of unsolicited commercial communications by e-mail. The first part of the amendment aims at deleting the obligation to have unsolicited commercial communications identified as such as soon as they are received by the recipient. In the Commission's view, this would diminish the protection of users in general and consumers in particular and has not been accepted.

The second part which establishes the obligation for Member States to ensure that opt-out registers are made available to consumers and are monitored by service providers opens up a pragmatic and workable solution to the problem of unsolicited commercial communications without prejudice to existing Directives and has therefore been reflected in new article 7(2) of the proposal. This modification should be read together with the modification of *recital 11* (following amendment 11) which further explains the objective of the article. Finally, the third part of amendment 38 does not need to be reflected in article 7 as the relevant question (obligation for service providers to inform their customers on the protection of personal data) is already dealt with in the data protection Directives. However, in order to make clear that the data protection Directives apply fully to electronic commerce a specific recital has been added (*recital 6a*).

## **Article 11**

- Article 11(1) has been modified with the objective of clarifying and simplifying the criteria established for the determination of the moment of conclusion of certain on-line contracts as requested in amendment 42.
- In article 11(2) the words “effective and accessible” have been added as well as a reference to the need to make available means to correct handling errors before the conclusion of the contract. Furthermore, a reference to the possibility for the consumer to reproduce the contract has been added. These modifications reflect amendment 73.

### **2.3. Amendments or parts of amendments which have not been accepted**

There are a number of amendments that the Commission is not in a position to accept for one of the following reasons:

- 2.3.1. *Because their objective and formulation is not sufficiently clear which could give rise to misinterpretation and lead to legal insecurity.*

Thus amendments 8, 26 and 58 have not been reflected in the modified proposal because they refer to a specific matter such as copyright which would seem superfluous in the context of this proposal, which is of a horizontal nature, and could be misinterpreted.

Amendments 23 and 64 have not been accepted because they could create confusion between different types of general interest objectives. Amendments 28, 30, 39, 59 and 60 proposing drafting modifications are not sufficiently clear in their objective and could be misinterpreted.

- 2.3.2. *Because they would not be consistent with Community law including other Community Directives.*

This is the case of amendment 10 which could be interpreted in a way being contrary to rules on the protection of personal data. It is also the case of amendments trying to modify the scope of application of the Directive in a manner which is not in line with the current Community framework for Information Society services (27 and 63).

- 2.3.3. *Because they would upset the balance of interests that on a number of issues has been proposed in the original proposal.*

This is the case as regards amendments concerning the liability of intermediaries (45 to 49, 53 and 54) which is a very important and sensitive area where a particular effort was made in the original proposal, in close consultation with the interested parties, to achieve a reasonable compromise solution that takes due account of all interests at stake. This is also the case of the amendments aiming at narrowing down the derogations in annex II of the proposal (amendments 21 and 68).

2.3.4. *Because they would be too ambitious at this stage given the level of Community integration.*

This is the case of amendment 61 concerning court actions by electronic means although on this last issue the Commission recognises that there is a need to improve possibilities of redress, especially in the cross border context and has introduced a new recital 16c on the subject.



Amended 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 547(2), 66 55 and 100a 95 thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>2</sup>,

Acting in accordance with the procedure referred to in Article 189b 251 of the Treaty<sup>3</sup>,

- (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 14(2) 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, **and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet;**
- (2a) **Whereas Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; whereas this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for Information Society services;**

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<sup>1</sup> OJ C 30, 5.2.1999, p. 4.

<sup>2</sup> OJ C 169, 16.6.1999.

<sup>3</sup> OJ C

- (2b) Whereas the free movement of Information Society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; whereas, for this reason, Directives covering the supply of Information Society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty;**
- (2c) Whereas the definition of Information Society service already exists in Community law, in the Directive 98/34/EC of the European Parliament and the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations<sup>4</sup>, as amended by Directive 98/48/EC of the European Parliament and the Council of 20 July 1998<sup>5</sup>. Whereas Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access<sup>6</sup>, has already referred to the definition provided by Directive 98/34; whereas this definition covers any service normally provided for or against remuneration, at a distance, via networks, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; whereas those services referred to in the indicative list in annex V of Directive 98/34/EC, as amended by Directive 98/48/EC, which do not imply data processing and storage are not covered by this definition;**
- (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 or commercial communications, or those providing tools allowing for search, access and retrieval of data; whereas Information Society services also include on-line activities via telephony and telefax services consisting in transmitting information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; whereas television broadcasting within the meaning of the Directive 89/552/EEC<sup>7</sup> of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, and radio broadcasting are not Information Society services because they are not provided at individual request; whereas by contrast**

<sup>4</sup> OJ L 204, 21.7.1998, p.37.

<sup>5</sup> OJ L 217, 5.8.1998, p.18.

<sup>6</sup> OJ L 320, 28.11.1998, p.54.

<sup>7</sup> OJ L 298, 17.10.1989, p.23.

**services which are transmitted point to point, such as video on demand or the sending of commercial communications by e-mail are Information Society services;**

- (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 legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State;
- (4a) Whereas it is important to ensure that electronic commerce can fully benefit from the Internal Market and therefore that, as with Directive 89/552, a high level of Community integration should be achieved;**
- (5) Whereas, in the light of Community objectives, of Articles 52 43 and 59 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by co-ordinating 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 5 of the Treaty;
- (5a) Whereas, in order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and uniform general framework to cover certain legal aspects of electronic commerce in the Internal Market;**
- (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 **the protection of minors and human dignity**, consumer protection and the protection of public health; whereas according to Article 129 152 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;
- (6a) Whereas the rules relating to the protection of personal data, in particular Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard**

**to the processing of personal data and the free movement of such data<sup>8</sup> and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector<sup>9</sup> are fully applicable to Information Society services; whereas these Directives already establish the Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the Internal Market, in particular the free movement of such data between Member States; whereas the implementation and application of this Directive should be in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability regime for intermediaries; whereas this Directive cannot prevent the anonymous use of open networks such as the Internet;**

- (7) Whereas this Directive does not aim to establish specific rules on private international law relating to conflicts of law or jurisdiction and ~~is therefore without prejudice to~~ **is not a substitute for** 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 where the services originate;
- (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;

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<sup>8</sup> **OJ L 281, 23.11.1995, p.31.**

<sup>9</sup> **OJ L 24, 30.1.1998, p.1.**

- (9a) **Whereas the definition of “recipient of a service” covers all types of usage of Information Society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons;**
- (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<sup>10</sup>; 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<sup>11</sup> 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<sup>12</sup> address the issue of consent by receivers to certain forms of unsolicited commercial communication and are fully applicable to Information Society services;~~ **Whereas the sending of unsolicited commercial communications by e-mail may be undesirable for consumers and Information Society service providers and may disrupt the smooth functioning of interactive networks; whereas the question of consent by recipients of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, in Directive 97/7/EC and in Directive 97/66/EC; whereas, in Member States which authorise unsolicited commercial communications by e-mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; whereas in addition it is necessary that in any event unsolicited commercial communications are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; whereas unsolicited commercial communications by e-mail should not result in additional communication costs for the recipient;**
- (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,

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<sup>10</sup> OJ L 144, 4.6.1997, p. 19.

<sup>11</sup> OJ L 213, 30.7.1998, p. 9.

<sup>12</sup> OJ L 24, 30.1.1998, p. 1

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<sup>13</sup>;

(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 **Community** framework for electronic signatures]<sup>14</sup>; 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;

(14) Whereas, amongst others, Council Directive 93/13/EEC<sup>15</sup>, of 5 April 1993, regarding unfair contract terms on unfair terms in consumer contracts 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<sup>16</sup> on misleading advertising of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, as amended by European Parliament and Council Directive 97/55/EC<sup>17</sup> of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, Council Directive 87/102/EEC<sup>18</sup> of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit on consumer credit; as last amended by European Parliament and Council Directive 98/7/EC<sup>19</sup> of the European Parliament and of the Council of 16 February 1998

<sup>13</sup> OJ L 19, 24.1.1989, p. 16.

<sup>14</sup> COM(1998) 297 final, 13.5.1998.

<sup>15</sup> OJ L 95, 21.4.1993, p. 29.

<sup>16</sup> OJ L 250, 19.9.1984, p. 17.

<sup>17</sup> OJ L 290, 23.10.1997, p. 18.

<sup>18</sup> OJ L 42, 12.2.1987, p. 48.

<sup>19</sup> OJ L 101, 1.4.1998, p. 17.

**amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit**, Council Directive 90/314/EEC<sup>20</sup> on package travel, package holidays and package tours, and ~~European Parliament and Council~~ Directive 98/6/EC<sup>21</sup> **of the European Parliament and of the Council of 16 February 1998 on consumer protection in connection with** on the indication of the prices of products offered to consumers; whereas this Directive should be without prejudice to Directive 98/43/EC<sup>22</sup> **of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member states relating to the advertising and sponsorship of tobacco products**, adopted within the framework of the Internal Market, or to other Directives on the protection of public health, **especially Council Directive 92/28/EEC<sup>23</sup> of 31 March 1992 on the advertising of medicinal products for human use;**

- (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 **and abstain from prohibiting or restricting the use of cryptographic methods or tools for protecting confidentiality or ensuring authenticity of the information transmitted or stored;**
- (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 ~~easing~~ **halting** 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 and should be encouraged by Member States;** 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 **and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC;**
- (16a) **Whereas it is important that the Directive .../.../EC of the European Parliament and the Council on the harmonisation of certain aspects of**

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<sup>20</sup> OJ L 158, 23.6.1990, p. 59.

<sup>21</sup> OJ L 80, 18.3.1998, p. 27.

<sup>22</sup> OJ L 213, 30.7.1998, p. 9

<sup>23</sup> OJ L 113, 30.4.1992, p. 13.

copyright and related rights in the Information Society<sup>24</sup> and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and related rights infringements at Community level;

- (16b) Whereas this Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based;
- (16c) Whereas the effective exercise of the freedoms of the Internal Market makes it necessary to guarantee victims effective access to means of settling disputes; whereas damage which may arise in connection with Information Society services is characterised both by its rapidity and by its geographical extent; whereas in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; whereas Member States should examine the need to provide access to judicial procedures by appropriate electronic means;
- (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 Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for such settlement of consumer disputes<sup>25</sup>;
- (17a) Whereas in the context of this Directive, notwithstanding the rule on the control at source of Information Society services, it would appear legitimate under certain circumstances for Member States to take measures to restrict the free movement of Information Society services; whereas, however, such measures must be taken in accordance with Community law and must be necessary to achieve one of the following public interest objectives pursued: 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 or public security; and consumer protection; whereas such measures must be strictly proportionate to their objective and must not go beyond what is necessary to achieve it;
- (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

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<sup>24</sup> COM (1999) 250 final of 21.5.1999

<sup>25</sup> OJ L 115, 17.4.1998, p. 31.



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 (**amongst others** 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"<sup>26</sup>;
- (20a) Whereas, despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the Internal Market, and for the establishment of an appropriate European regulatory framework; whereas such coordination should also contribute to the establishment of a common and strong negotiating position in international fora;**
- (20b) Whereas, in order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector;**
- (20c) Whereas, if the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible;**

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<sup>26</sup> COM(98) 50 final.

- (20d) **Whereas cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries and the European Union's main trading partners;**
- (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;
- (22a) **Whereas electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields;**
- (23) Whereas the Council, in its Resolution of ~~3 November 1998~~ **19 January 1999** on the consumer aspects of the Information Society<sup>27</sup>, 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 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<sup>28</sup>, as amended by Regulation (EEC) No 3089/93<sup>29</sup>.
- (25) Whereas ~~Commission~~ **Council** Regulation (EC) No 2027/97<sup>30</sup> **on air carrier liability in the event of accidents** 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,

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<sup>27</sup> **OJ C 23, 28.1.1999, p. 1**

<sup>28</sup> OJ L 220, 29.7.1989, p. 1.

<sup>29</sup> OJ L 278, 11.11.1993, p. 1.

<sup>30</sup> OJ L 285, 17.10.1997, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

## Chapitre 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.

### *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.~~

**Information Society services within the meaning of Article 1(2) of Directive 98/34/EC of 22 June 1998 laying down a procedure for the**

**provision of information in the field of technical standards and regulations as amended by Directive 98/48/EC of 20 July 1998<sup>31</sup>**

- (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) 'consumer': any natural person who is acting for purposes which are outside his or her trade, business or profession.**
- (f) (g) "*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.

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<sup>31</sup> OJ L 204, 21.7.1998, p.37. as amended by Directive 98/48/EC of 20.7.1998, OJ L 217, 5.8.1998, p. 18.

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 private international law.

## **Chapitre 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<sup>32</sup>.

#### *Article 5 – General information to be provided*

1. **Without prejudice to the obligations deriving from Directive 97/7/EC** 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;
  - (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:

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<sup>32</sup> OJ L 117, 7.5.1997, p. 15.

- 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 **where prices of Information Society services refer to prices, and other essential terms and conditions, these** are to be indicated accurately and unequivocally **and must include all additional costs.**

## SECTION 2 – COMMERCIAL COMMUNICATIONS

### *Article 6 – Information to be provided*

**Without prejudice to the obligations deriving from Directive 97/7/EC,** 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 **by the Member State in which the service provider is established**, 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 **by the Member State in which the service provider is established**, 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*

- 1.** 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.

- 2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by e-mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.**

*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. 3. 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 contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance**

**The following principles apply:**

- (a) **acknowledgement of receipt is deemed to be received when the recipient of the service is able to access it;**
- (b) **the service provider is obliged to immediately send the acknowledgement of receipt.**



- ~~(a) the contract is concluded when the recipient of the service:~~  
~~— has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance, and~~  
~~— has confirmed receipt of the acknowledgement 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) acknowledgement 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 **that are effective and accessible** allowing him to identify and correct handling errors **and accidental transactions before the conclusion of the contract. Contract terms and general conditions provided to the consumer must be made available in a way that allows him to store and to reproduce them.**

#### **SECTION 4 - LIABILITY OF INTERMEDIARY SERVICE PROVIDERS-IES**

##### *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 ~~to~~ 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.

**Chapitre 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 **and consumer** 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 **and consumer** 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.
  - (e) the drawing up of codes of conduct regarding the protection of minors and human dignity**
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 for 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<sup>33</sup>.

#### *Article 19 – Co-operation 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;

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<sup>33</sup> OJ L 166, 11.6.1998, p. 51.

- (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.

### **Chapitre 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 Directives 95/46/EC<sup>34</sup>; and 97/66/EC<sup>35</sup> of the European Parliament and of the Council<sup>36</sup>;

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<sup>34</sup> OJ L 281, 23.11.1995, p. 31.

<sup>35</sup> OJ L 24, 30.1.1998, p.1

- (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;
- (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.

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<sup>36</sup> OJ L 281, 23.11.1995, p. 31.

- (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.

## Chapitre 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*

- 1.** 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, **containing statistical results and** accompanied, where necessary, by proposals for adapting it to developments in the field of **digital technologies and Information Society services**.
- 2.** **The report shall examine the need for adaptation in the light of technical and economic developments and emerging jurisprudence in the Member States. It should in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, notification requirements and the attribution of liability following the taking down of content;**

### *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

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<sup>1</sup> and Directive 96/9/EC<sup>2</sup> 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<sup>3</sup>;
- Article 44 paragraph 2 of Directive 85/611/EEC<sup>4</sup>;
- Article 30 and Title IV of Directive 92/49/EEC<sup>5</sup>, Title IV of Directive 92/96/EEC<sup>6</sup>, Articles 7 and 8 of Directive 88/357/EEC<sup>7</sup> and Article 4 of Directive 90/619/EEC<sup>8</sup>;
- contractual obligations concerning consumer contracts;
- unsolicited commercial communications by electronic mail, or by an equivalent individual communication.

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> European Parliament and Council Directive .../.../EC of ..... [on the taking up and the prudential supervision of the business of electronic money institutions].

<sup>4</sup> 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).

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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/EEC.

<sup>8</sup> 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.

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