DIRECTIVE 2000/31/EC
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
ON CERTAIN LEGAL ASPECTS OF INFORMATION SOCIETY SERVICES,
IN PARTICULAR ELECTRONIC COMMERCE,
IN THE INTERNAL MARKET
("DIRECTIVE ON ELECTRONIC COMMERCE")
DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 8 June 2000

on certain legal aspects of Information Society services,
in particular electronic commerce, in the Internal Market
("Directive on electronic commerce")

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2),
55 and 95 thereof,

Having regard to the proposal from the Commission ¹,

Having regard to the Opinion of the Economic and Social Committee ²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ³,

¹ OJ C 30, 5.2.1999, p. 4.
² OJ C 169, 16.6.1999, p. 36.
Council Common Position of 28 February 2000 (not yet published in the Official Journal) and
Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 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; the development of Information Society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

(2) 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.

(3) 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; 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.
(4) It is important to ensure that electronic commerce could fully benefit from the Internal Market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities ¹, a high level of Community integration is achieved.

(5) The development of Information Society services within the Community is hampered by a number of legal obstacles to the proper functioning of the Internal Market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; 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; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

(6) In the light of Community objectives, of Articles 43 and 49 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; 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 5 of the Treaty.

In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the Internal Market.

The objective of this Directive is to create a legal framework to ensure the free movement of Information Society services between Member States and not to harmonise the field of criminal law as such.

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; 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; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

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; 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; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

¹ OJ L 95, 21.4.1993, p. 29.
⁷ OJ L 80, 18.3.1998, p. 27.

(12) 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; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the Internal Market; 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.

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4 OJ L ...
(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the
drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed
the protection of individuals with regard to the processing of personal data and on the free
movement of such data ¹ 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 ² which are fully applicable to
Information Society services; these Directives already establish a 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 personal data between Member States; the implementation and
application of this Directive should be made in full compliance with the principles relating to
the protection of personal data, in particular as regards unsolicited commercial
communication and the liability of intermediaries; this Directive cannot prevent the
anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 of Directive 97/66/EC; in
accordance with that Directive, Member States must prohibit any kind of interception or
surveillance of such communications by others than the senders and receivers, except when
legally authorised.

¹ OJ L 281, 23.11.1995, p. 31.
(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of Information Society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services and in 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; this definition covers any service normally provided for remuneration, at a distance, 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; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

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Information Society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; Information Society services are not solely restricted to services giving rise to on-line contracting but also, insofar 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; Information Society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not Information Society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video on demand or the provision of commercial communications by electronic mail are Information Society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an Information Society service; the contractual relationship between an employee and his employer is not an Information Society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not Information Society services.
(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; 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 but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) 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.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to Information Society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member State's legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member State's requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.
(22) Information Society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; 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; 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; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such Information Society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide Information Society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of Information Society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of Information Society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide Information Society services in conformity with conditions established in this Directive.
(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.

(27) This Directive, together with Directive 2000/ /EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creation of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances to restrict the freedom to provide Information Society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors.

(28) The Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification services.

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(29) Commercial communications are essential for the financing of Information Society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and Information Society service providers and may disrupt the smooth functioning of interactive networks; 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; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; 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; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.

(31) Member States which allow the sending of unsolicited commercial communication by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.
In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions 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; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.

This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.

Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; 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; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures 1; the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

This Directive does not affect Member States' possibility to maintain or establish general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.

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(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of Information Society services.
(40) Both existing and emerging disparities in Member States' legislation and case-law concerning 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; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of Information Society services to adopt and implement such procedures; 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.

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.
(42) The exemptions from liability established in this Directive cover only cases where the activity of the Information Society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the Information Society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.
(46) In order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility to establish specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States to require service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties to decide freely whether to adhere to such codes.
(50) It is important that the proposed Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society 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.

(51) 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; 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.

(52) The effective exercise of the freedoms of the Internal Market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with Information Society services is characterised both by its rapidity and by its geographical extent; 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; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to Information Society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of Information Society services by ensuring a high level of consumer protection.
The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

As regards the derogation contained in this Directive concerning 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.

The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, UNCITRAL) on legal issues.
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; such coordination should also contribute to the establishment of a common and strong negotiating position in international fora.

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.

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.

Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union’s other trading partners.
(63) 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; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of Information Society services; in any case, the development of the Information Society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its Resolution of 19 January 1999 on the Consumer Dimension of the Information Society ¹, stressed that the protection of consumers deserved special attention in this field; 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; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Objective and scope

1. This Directive seeks to contribute to the proper functioning of the Internal Market by ensuring 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, certain national provisions on Information Society services relating to the Internal Market, 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 level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them insofar as this does not restrict the freedom to provide Information Society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.
5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to Information Society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of Information Society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority;

- the representation of a client and defence of his interests before the courts;

- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.
Article 2  
Definitions  

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

(a) "Information Society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(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 indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, 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) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;
(f) "commercial communication": 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 regulated profession. The following do not in themselves 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, particularly when this is without financial consideration;


(h) "coordinated field": requirements laid down in Member States' legal systems applicable to Information Society service providers or Information Society services, regardless of whether they are of a general nature or specifically designed for them.

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(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

- the taking up of the activity of an Information Society service, such as requirements concerning qualifications, authorisation or notification;

- the pursuit of the activity of an Information Society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.

(ii) The coordinated field does not cover requirements such as:

- requirements applicable to goods as such;

- requirements applicable to the delivery of goods;

- requirements applicable to services not provided by electronic means.

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

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given Information Society service if the following conditions are fulfilled:

   (a) the measures shall be:

   (i) necessary for one of the following reasons:

   – public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;

   – the protection of public health;

   – public security, including the safeguarding of national security and defence;

   – the protection of consumers, including investors;
(ii) taken against a given 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) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate;

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility to proceed with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.
CHAPTER II
PRINCIPLES

Section 1: Establishment and information requirements

Article 4
Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an Information Society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

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 of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services 1.

Article 5
General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

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

(c) the details 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 or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

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

– the professional title and the Member State where it has been granted;

– a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment ¹.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where Information Society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6
Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an Information Society service comply at least 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 permitted in the Member State where 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 clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.
Article 7
Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously 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 electronic 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 ensure that the use of commercial communications which are part of, or constitute, an Information Society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, 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 commercial communication in conformity with the rules referred to in paragraph 1.
3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close co-operation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

**Article 10**

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11
Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

   – the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means;
– the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers

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 a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable 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 insofar 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.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

Article 13

Caching

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable 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 widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

Article 14
Hosting

1. Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

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

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.

**Article 15**

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 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. Member States may establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.
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, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(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 trade, 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. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with point (a) of paragraph 1. Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.
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 the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant 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 court actions available under national law concerning Information Society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.
2. The Annex to Directive 98/27/EC shall be supplemented as follows:


**Article 19**

Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.
4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20
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.
CHAPTER IV
FINAL PROVISIONS

Article 21
Re-examination

1. Before ………. *, 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 legal, technical and economic developments in the field of Information Society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the Internal Market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the Internal Market principles to unsolicited commercial communications by electronic mail.

* Three years after the date of entry into force of this Directive.
Article 22

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before …… ∗. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, 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 23

Entry into force

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

∗ 18 months after the date of entry into force of this Directive.
Article 24
Addressees

This Directive is addressed to the Member States.

Done at Luxembourg,

For the European Parliament
The President

For the Council
The President
Derogations from Article 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC \(^1\) and Directive 96/9/EC \(^2\) 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 8(1) of Directive 2000//EC \(^3\);

- Article 44(2) of Directive 85/611/EEC \(^4\);


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\(^1\) OJ L 24, 27. 1.1987, p. 36.
– the freedom of the parties to choose the law applicable to their contract;

– contractual obligations concerning consumer contracts;

– formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated;

– the permissibility of unsolicited commercial communications by electronic mail.
OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Information Society services)
on: 18 December 1998


1. Following the presentation by the representative of the Commission of the above-mentioned proposal, the Working Party held its first general exchange of views on 18 December 1998 and began a detailed examination of the text on the basis of a provisional version submitted by the Commission's services in English and French.

2. In their preliminary remarks(1) delegations welcomed in general this initiative, but wished to stress their concern regarding, in particular, the following key points:

- the importance of ensuring confidence in electronic commerce;
- the need to clarify the scope of this proposal;
- the importance of clarifying the country of origin principle;
- the issue of liability; and
- the need to ensure that derogations are in line with other EU directives.

(1) It should be noted that at this stage most delegations introduced a general scrutiny reservation on the Commission initiative, and that the D, DK and UK delegations introduced a parliamentary scrutiny reservation on it.
Certain delegations also considered that the following areas should be examined further:

- the need to define a European position in the context of international discussions;
- the importance of harmonising the legal framework of electronic commerce not only at EU level but also at international level;
- the relationship between this proposal and other EU directives, in particular those relating to consumer protection

3. Detailed interventions by delegations and the representative of the Commission could be summarised as follows.

a) **General provisions (chapter I)**

A number of delegations expressed doubts about the scope of the proposal, with certain of them requesting a list of areas not covered by the proposed Directive to be included in the Annexes. In response, the Commission representative indicated his willingness to provide such a list of examples but asked to leave open the question whether or not they should be included in the Directive.

A number of delegations emphasized the importance of improving definitions; several of them insisted in particular on the need to define accurately the scope of "information society services". In response, the representative of the Commission recalled that the proposed definition was the same as the one established by the "Transparency Directive". Nevertheless certain delegations still maintained their request to improve this definition.

A expressed doubts about the role of the Committee concerning the modification of the list of activities excluded from the scope of the Directive.

Some delegations queried the relationship between this proposal and certain sectoral initiatives (UK: the directive on advertising of pharmaceutical products; P: the "Television without frontiers" Directive; UK: "transparency Directive").
Several delegations felt that the definition of the country of origin should be clarified further, with **UK** expressing concern about how to determine a single place of establishment of the service provider in the case where the service provider has a number of establishments.

b) **Principles** (chapter II)

Several delegations considered that the provisions on commercial communications needed to be examined, in particular those concerning the concept of "country of origin". Several delegations also expressed concern about how the moment of the conclusion of electronic contracts could be identified.

**D** delegation expressed the view that the implementation of Article 7, which aims at making commercial communication clearly identifiable, would be difficult in practice. The representative of the Commission answered that it is sufficient to mention that it was a commercial communication.

Concerning recognition of electronic contracts, a number of delegations emphasized the need to clarify the relationship between contracts concluded by electronic means and the other kind of contracts. Some delegations queried whether Member States can still impose written contracts which requires certain traditional forms (e.g. notary services). In response, the Commission representative explained that the proposal includes exceptions for notary services and public authorities.

A number of delegations felt that the provision concerning treatment of electronic contracts should be clarified. Delegations expressed doubts on the derogations which are proposed, and in particular about the inclusion of family law among the derogations. In response, the Commission representative answered that electronic technology is a dynamic and constantly changing field and could therefore include contracts falling within the scope of family law in the future.
Several delegations wanted to refine and clarify the liability of intermediaries, certain of them expressing doubts about the scope of penal sanctions laid down in Article 21. In this context some delegations proposed to make a distinction between service providers who know that they transmit illicit data and those who do not know. In response, the representative of the Commission pointed out that the introduction of this kind of distinction could cause confusion.

One delegation (UK) proposed to clarify the provision concerning hosting.
COVER NOTE

from : Mr Carlo TROJAN, Secretary-General of the European Commission
date of receipt: 23 December 1998
to : Mr Jürgen TRUMPF, Secretary-General of the Council of the European Union


Delegations will find attached Commission document COM(98) 586 final 98/0325 (COD).

Encl.: COM(98) 586 final 98/0325 (COD)
1. **Introduction**

The Working Party on Economic Questions (Information Society services) on 15 January 1999 began its first reading of the above-mentioned proposal with an examination of Articles 1 to 3.\(^1\)

The comments by delegations are summarised hereafter. On many of the points, the representative of the Commission explained the Commission's viewpoint and also clarified a number of the more technical queries.

It has to be noted also that further to the general comments made by delegations in the Working Party on 18 December 1998, the IRL delegation pointed out the importance of harmonising the legal framework of electronic commerce not only at EU level but also at international level, stressing that the proposed Directive should not cause a competitive disadvantage for EU operators.

\(^{1}\) At this stage most delegations introduced a general scrutiny reservation on the proposal and the D, DK and UK delegations maintained a parliamentary scrutiny reservation.
2. Comments by delegations

a) Objective and scope (Article 1)

Certain delegations (ES, I) expressed some doubts about the relationship between the scope of the Directive (Information Society services) and the title, which refers to electronic commerce. In response, the Commission representative considered that it was not necessary to use the legally binding term of "Information Society services" in a title which was only intended to give a general indication as to the content of the Directive.

Several delegations (B, F, I in particular) expressed doubts about the scope of the proposal, in particular in relation to the excluded activities as specified in the Annexes.

A number of delegations (A, B, D, ES and P in particular) queried the relationship between this proposal and other EU Directives, in particular the "Transparency" Directive and those relating to consumer protection, electronic signatures and financial services. In response to the request of delegations, the Commission representative indicated her willingness to draw up a table outlining the EU measures which have implications for this Directive, and indicated that the Commission had tried to avoid any inconsistencies or unnecessary duplication with other EU initiatives.

b) Definitions (Article 2)

Article 2(a)

A number of delegations emphasized the importance of improving the definitions and insisted in particular on the need to accurately define the scope of "Information Society services".
In this context, certain delegations (ES, FIN, NL, S and UK in particular) underlined the importance of making a clear distinction between goods and services. In addition the UK delegation considered that it was essential to have an indicative list of services not covered by this Directive (similar to Annex V of Directive 98/48/EC).

In response to the concern of some delegations (I, NL and UK in particular), that the "free" services may be excluded, the Commission representative explained that this was not the case since remuneration for these services was provided for by other means (e.g. advertising or sponsoring).

Concerning more specific points:

- **UK** expressed the view that "confidentiality services" should be excluded from this Directive.

- **B** asked whether the Directive also applied to closed user group networks.

- **A** expressed concern that the 2nd indent would also seem to include voice telephony provided over the Internet or by ISDN.

**Article 2(b) and 2(c)**

As regards definitions of "service provider" in 2(b) and "established service provider" in 2(c), a number of delegations (B, FIN, I, NL, S and UK) expressed concern about how to determine the place of establishment of the service provider and the applicable law in the case where the service provider was established in a number of Member States. The **UK** delegation stressed the need for a more precise definition of service provider in the text rather than in the recital 9, but at this stage reserved its position on the current wording of this recital.

**FIN, I and S** queried whether established service providers could also be natural persons. The **B** delegation, for its part, expressed some doubts about the criteria of "an indeterminate duration" in 2c.

**Article 2(d)** **IRL** queried the meaning of the last clause of this definition.
Article 2(e)
Certain delegations (A, B, D and ES in particular) emphasized the need to clarify the link between the definitions of "information society services" in 2(a) and "commercial communications" in 2(e). In response, the Commission representative pointed out that 2(a) should be read in parallel with 2(e) and that the latter definition only referred to commercial communications in as far as they were carried out as Information Society services.

A also queried the relationship between 2(e) and Articles 6 and 7. A and D, for their part, expressed concern that a domain name or an electronic-mail address did not constitute a commercial communication. In addition, the IRL delegation wanted to distinguish between active and passive selling.

Article 2(f)
Some delegations (B, DK and NL in particular) expressed the view that the definition of "coordinated field" needed to be further clarified and also noted their concerns in relation to the use of this term in Article 3.

In addition, the UK delegation suggested the inclusion of a definition of consumer, but the Commission representative felt that it was not necessary.

c) Internal market (Article 3)

Whilst not rejecting the principle of "country of origin" a number of delegations (B, DK, F, FIN and UK in particular) indicated some concerns about the application of this principle. ES, even considered that paragraph 1 was superfluous.

In response to the particular concern that this article allowed service providers to circumvent consumer protection legislation in those Member States which had a greater level of protection than the minimum level required by EC legislation, the Commission representative recalled the Court of Justice case law in this respect.
Concerning more specific points:

- B, F and UK asked for clarification about the link between the notification requirements in the "Transparency" Directive and the requirements in this article;

- I and UK noted their concern about the application of paragraph 3 with regard to consumer contracts in general.
OUTCOME OF PROCEEDINGS

of : Working Party on Economic Questions (Information Society services)

on : 29 January 1999

No. prev. doc.: 5378/99 ECO 15 CODEC 31 CONSOM 6
No. Cion prop.: 5123/99 ECO 2 CODEC 6


1. Introduction


The main comments on these articles are summarised hereafter. On many of the points, the representative of the Commission clarified the position of its institution.
2. Comments by delegations and Commission's clarifications

a) Exclusion of prior authorization (Article 4)

In general delegations were in favour of the principles contained in this Article. Nevertheless the following clarifications were asked:

- Several delegations questioned about the precise scope of the prior authorization principle and queried in particular to what extent Member States still have the possibility of maintaining accreditation system or notification registry. One delegation suggested to clarify this issue in the recitals. The possible contradiction between Article 4(2) and Article 3(2) was also raised.

In response the Commission representative underlined that the aim of this Article was to exclude all proceedings of prior authorization, including any measures which had similar effect in practice.

The Commission representative answering more particularly to the relationship between Article 4(2) and Article 3(2), confirmed that the existing prior authorization regimes for off-line similar activities were not affected by this directive. The Commission representative also explained that Member States were able to maintain accreditation systems if they were not specific to Information Society services and if they did not impose more burdensome requirements for these services solely on the grounds that they were provided on-line or in electronic form.

- Several delegations expressed doubts on the expression "Member States shall lay down in their legislation that ..." in Article 4(1), with UK proposing to use the traditional formula "Member States shall ensure that...". The Commission representative undertook to clarify this request.

- Some delegations raised the issue of sanctions in case of non compliance of these provisions. The Commission representative indicated that the sanctions were left entirely to Member States.
- Concerning more specific points:

- as a reply to UK concern, the Commission representative confirmed that Article 4(1) does not cover interconnection disputes;

- expressed the view that Article 4(2) should contain a reference to Directive 97/77/EC (Postal services). The Commission representative proposed to discuss this matter bilaterally;

- A expressed concern that Internet mail orders seemed to be subject to more burdensome requirements than traditional mail orders.

At the request of the Group the Commission representative promised that it will present, in due course, a table outlining the EU measures which have implications for this Directive.

b) General information to be provided (Article 5)

Article 5(1)

As a preliminary view, the majority of delegations expressed the opinion that this Article seemed to establish the right balance between the different needs of consumers, business and public authorities. However some delegations (D, FIN and IRL in particular) considered that the amount of information rather excessive.

Certain other delegations (NL and S) queried why this Article did not make distinction between "business to business" and "business to consumer" contracts. In response, the Commission representative explained that these information requirements were also important in commercial relations.

Concerning the wording of paragraph 1 several delegations (ES, F, GR, I and P in particular) insisted that these informations should be provided as clearly as possible, with P wishing to add the expression "in a clear and understandable manner".
Certain delegations considered that this Article placed too much emphasis on websites and not enough on other electronic means, with UK in particular questioning why more burdensome information was required for Information Society services than for similar off-line services. In response the Commission representative underlined that there are differences between on-line and off-line services which justifies new rules.

Concerning more specific remarks, the representative of the Commission:

- as an answer to certain delegations (FIN, I, IRL) on what is meant by "in a direct and permanent manner" in 5(1), precised that the information would have to be always available and that this expression was chosen because it was technologically neutral;

- in response to concerns of several delegations (B, DK, ES and I in particular), explained that physical address of the service provider was covered implicitly in 5(1)(b), since had to be read together with Article 2(c);

- as an answer to ES on the use of registration number in (d) and VAT number in (g), acknowledged that the text of these points might need some clarification in this respect;

- as answer to a number of delegations (D, F, GR, I, NL and UK) on interrelated services, explained that in the cases of combined services each provider was responsible to give information under Article 5 for his part of Information Society service;

- as regards responsibility of Member States the Commission confirmed that Member States had only responsibility of service providers that were established within their territory.

Paragraph 2

Some delegations (A, B, IRL and UK in particular) having pointed out that in some cases it would be difficult to provide informations on the end price, the Commission representative indicated that the expression "the prices should be indicated accurately and unequivocally" covered only these cases where prices were given.
(c) **Commercial communications: Information to be provided (Article 6)**

Certain Member States queried where there was a proper balance between mutual recognition and the consumer protection aspects, in particular, with regard to letters (c) and (d).

**NL** questioned whether the list set out in this Article was exhaustive or whether it only provided for minimum requirements. The Commission representative answered that it was a minimum list but precised that additional conditions should not restrict application of Article 3.

**F** emphasized the importance of clarifying borderline between commercial communications and contractual obligations. In response the Commission representative declared that the purpose of recital 19 was to clarify this aspect.

Concerning more specific points:

- **IRL** felt the word "premium" in (c) should be clarified;
- **A** expressed doubts on the words "promotional offers" since in Austria the legal term related only to conclusion of contracts;
- as an answer to **P** concerning advertising on websites, the Commission representative stated that no specific indication was necessary to make it clear that it is an advertisement;
- **A** suggested to specify that section 2 only related to commercial communications in electronic form.

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(1) **UK** entered a formal scrutiny reserve on this Article.
OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Information Society services)
on: 15/16 February 1999

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<tr>
<th>No. prev. doc.:</th>
<th>5733/99 ECO 33 CONSOM 11 CODEC 86</th>
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<td>No. Cion prop.:</td>
<td>5123/99 ECO 2 CODEC 6</td>
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1. Introduction

The Working Party on Economic Questions (Information Society services) on 15/16 February 1999 continued its first reading of the above-mentioned proposal with the examination of Articles 7 to 11.

The main comments on these Articles and the Commission’s clarifications are summarised hereafter. Delegations will also find annexed a table outlining the EU measures which have implications on this Directive. This table was distributed during the meeting.
2. Comments by delegations and Commission’s clarifications

a) Unsolicited commercial communication (Article 7)

A number of delegations expressed the view that the sending of unsolicited messages to consumers was undesirable, with several of them (A, ES, FIN, I and P in particular) emphasizing the need to set up a system of prior authorization (opt-in).

In response, the Commission representative explained that this Article did not distinguish between the opt-out (explicit consent) or the opt-in solution, and only required unsolicited communications to be clearly indicated in order to allow the recipient to instantly identify it as a commercial communication without having to open it. The Commission representative also explained that Member States were able to go further and introduce prior authorization in their legislation, if they so wished.

In this context some delegations queried whether more specified measures (e.g. filter systems) should be introduced in order to identify unsolicited messages. The Commission representative considered that the Directive should leave room for market developments and not set up standards.

The Commission representative answering to a question on the relationship between this Article and other EU Directives, confirmed that there was no conflict between this Article and Article 10(2) of Directive 97/7/EC and Article 12(2) of 97/66/EC.

Concerning more specific points:

- as a reply to ES concern, the Commission representative confirmed that Article 7 did not differentiate between consumers and enterprises;

- as an answer to D and E which raised the case of EU companies remailing unsolicited commercial communications via third countries, the Commission representative confirmed that Article 7 was applicable to this case since the decisive factor is the place of establishment of the companies and not the location of the remailer;

- as regards the scope of this Article, FIN and I queried whether text messages in mobile phones or websites were also covered by Article 7;

- P expressed the view that this Article should contain a reference to vulnerable consumer groups (e.g. children).
b) **Regulated professions (Article 8)**

A number of delegations (B, ES, I, NL and P in particular) asked for more clarification both on the objective and precise wording of this Article. In particular several delegations (B, ES, F and UK) emphasized the importance of clarifying what was meant by "regulated professions".

In response, the Commission representative explained that the objective of this provision was to guarantee that all professions could provide Information Society services and benefit of recent technological developments. The Commission representative also indicated that the term "regulated professions" was included in Directive 89/48/EC.

Whilst not rejecting the idea of encouraging codes of conduct, a number of delegations indicated concerns about the necessity of regulating them at European level. In any case several delegations felt that paragraph 3 seemed to undermine paragraph 2.

(c) **Treatment of electronic contracts (Article 9)**

Several delegations (B, DK, ES, FIN, NL and S) expressed concern about the objective of this Article, since it seemed to intervene with civil law principles. In this context they doubted that Article 100a was the correct legal basis.

In response, the Commission representative considered that it was necessary to provide minimum level of security for electronic contracts. The aim of this provision was not to harmonise civil law but merely to require Member States to carry out a review of those rules which might have an effect on electronic commerce and, where necessary, to adapt them.

Concerning paragraph 2, a number of delegations underlined the importance of clarifying the list of derogations (A: registrars; UK: inheritance and family law; ES, I and P: law relating to land and property; GR: contracts requiring a witness).

In response, the Commission representative indicated that the Commission services were prepared to reformulate the list of derogations in the light of comments made by delegations.
A number of delegations (A, B, ES, FIN, GR, NL and P in particular) felt that the list of categories of contracts provided for in paragraph 2 should be exhaustive and not be amended by the Commission.

In response, the Commission representative answered that paragraph 2 involved legal issues which were determined by technical development and thus needed to be adapted by the committee procedure. However, the Commission representative indicated that the Commission services were ready to reexamine this paragraph.

In response to concerns of certain delegations (B and GR), that paragraph 4 laid down a burdensome requirement for Member States, the Commission representative explained that this provision was necessary in order to ensure transparency of electronic contracts.

Concerning more specific points:

- some delegations (B, D, ES, F, I and S in particular) expressed doubts on the scope of Article 9(1), S suggesting to add a definition of electronic contracts. In response the Commission representative explained that this Article covered only Information Society services contracts. All other types of contracts (e.g. contracts at state level, public contracts) were not covered. She also explained that unilateral statements were excluded from the scope of Article 9;

- as an answer to L, concerning the relationship between Article 9(1) and the Rome Convention, the Commission representative underlined that the provisions of the Rome Convention will continue to apply normally;

- several delegations (D, ES, NL and UK) emphasized the importance of clarifying the relationship between this Article and other EU directives. UK, with support from NL and P, suggesting to have an indicative list of services not covered by this Directive (similar to Annex V of Directive 98/48/EC). (1)

(d) Information to be provided (Article 10)

In response to the concerns of some delegations (FIN, IRL, NL and UK in particular) that this Article set up a rather excessive system, the Commission representative explained that this Article was important to protect vulnerable parties (e.g. consumers) by providing minimum level of information on various stages of contractual process. She also explained that Article 10 did not deal with judicial aspects of electronic contracts, since it only provided for information on the formation of electronic contracts.

(1) See table in annex.
Several delegations (B, ES, F, GR, I, P and UK in particular) underlined the importance of clarifying what is meant by "professional persons". The Commission representative having explained that anybody who was not a consumer under definition laid down in Article 2(2) of Directive 97/7/EC was to be considered a professional person, two delegations (ES, UK) still maintained their request to define "professional persons".

Concerning paragraph 3 several delegations expressed the view that Member States should encourage the use of codes of conduct in their legislation rather than making it mandatory. The Commission representative explained that the aim of this paragraph was to facilitate information and access to relevant codes of conduct that the service provider is subject to.

Concerning more specific remarks:

- Several delegations queried how to enforce paragraph 2 at national level.
- ES, IRL and P expressed the view that information to be provided should be accurate and clear and that contracts should be easily understandable;
- a number of delegations (A, B, F, GR, I and UK) underlined the importance of clarifying what is meant by "filed" in (b);
- several delegations (ES, GR, I and UK) having asked what is meant by "handling errors" in (c), the Commission representative precised that (c) did not cover legal errors and concerned only technical errors (e.g. typing mistakes or clicking on a wrong icon);
- in response to concerns of several delegations (A, F, I and UK in particular), the Commission representative explained that the proposed directive did not change information obligations provided for in other EU directives;
(e) **Moment at which the contract is concluded** (Article 11)

A number of delegations (B, DK, ES, F, FIN, NL, S, and UK) expressed some doubts about these specific rules determining the time at which a contract is concluded, in particular on the necessity of dual acknowledgment in (a). The Commission representative indicated that the Commission services will reflect on this last provision.

In addition several delegations pointed out that this paragraph was not technologically neutral since it seemed to place too much emphasis on websites and not enough on other electronic means such as e-mail. In response, the Commission representative confirmed that Article 11 was specifically focused on websites.

Concerning paragraph 2 certain delegations (B and P) queried the relationship between this paragraph and Article 10(1)(c). In response the Commission representative explained that Article 11(2) was an additional provision to Article 10(1)(c).

Concerning more specific remarks:

- some delegations (DK, P and UK) having asked how service providers know whether a recipient has been able to access confirmation messages in 11(1)(b), the Commission representative explained that it was sufficient that acknowledgment of receipt had been sent and arrived in the recipient’s e-mail box.

- as regards the expression "as quickly as possible" in (c), which raised some doubts, the Commission representative indicated that such explanation was commonly used in Member State’s legislation.
PROPOSAL FOR A DIRECTIVE ON CERTAIN LEGAL ASPECTS OF ELECTRONIC COMMERCE

TABLE ON RELATIONSHIP WITH OTHER COMMUNITY DIRECTIVES

Preliminary remarks:
- The proposed Directive builds upon and complements existing Community law applicable to Information Society Services.
- Existing horizontal or sectoral directives continue to apply.
- The proposed Directive does not establish a separate legal framework for Information Society Services but rather addresses and clarifies new legal issues which are specific to online activities.

<table>
<thead>
<tr>
<th>ISSUES ADDRESSED BY THE PROPOSED DIRECTIVE</th>
<th>RELATIONSHIP WITH THE MOST RELEVANT DIRECTIVES</th>
</tr>
</thead>
</table>
| DEFINITIONS                                | - The proposed e-commerce directive reproduces the definition of Information Society Services already established in other directives (this provides legal consistency and coherence and avoids an overlap with the "Television Without Frontiers" Directive):
|                                            | "Conditional Access" Directive 98/84/EC |
|                                            | Both Directives use the same definition of Information Society Services. This definition is therefore already part of the "acquis communautaire". The definition does not cover television broadcast services as defined in the Television Without Frontiers Directive. |
|                                            | - "Television Without Frontiers" Directive 89/552/EC (modified 97/36/EC) Covers television broadcast. It explicitly excludes communication services on individual demand. |

| INTERNAL - MARKET PRINCIPLE                | This approach implements the free movement of services enshrined in the EC Treaty (article 59) and is coherent with other directives and proposals concerning electronic media, for example: |
| Article 3 requires Members States to ensure that Information Society Service providers established on their territory comply with national law and prevents Members States from restricting the freedom to provide Information Society Services from other Members States. | - "Television Without Frontiers" Directive 89/552/EC (modified 97/36/EC)  
|                                            | - "Data protection" Directive 95/46/EC  
|                                            | - "Conditional access" Directive 98/84/EC  
|                                            | These directives are based on a similar internal market approach. |

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1 The list of the directives indicated below is not exhaustive: only the most relevant directives are mentioned.
2 This includes, for instance, directives in the area of consumer protection, financial services, regulated professions, etc.
<table>
<thead>
<tr>
<th>ESTABLISHMENT</th>
<th>COMMERCIAL COMMUNICATIONS</th>
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<tbody>
<tr>
<td><strong>Article 4.1</strong> establishes the principle of non authorisation which prevents Member States from introducing specific authorisation schemes for Information Society Services.</td>
<td>This approach has also been adopted in the proposal for a directive on electronic signatures, COM (98) 297 final which prevents Member States from introducing specific authorisation schemes for certification service providers.</td>
</tr>
<tr>
<td><strong>Article 4.2</strong> clarifies that this principle is without prejudice to general authorisation schemes not specifically targeting information society service providers and without prejudice to licensing schemes as permitted by directive 97/13.</td>
<td>- General authorisation schemes, which apply both to online activities and off line activities such as, for example, those provided for in the “1” Banking Directive 77/780/EEC remain fully applicable.</td>
</tr>
<tr>
<td>Article 5 establishes general transparency requirements concerning the main characteristics of the service provider.</td>
<td>- Licensing schemes as permitted by the General Authorisation and Individual Licences in the Field of Telecommunication Services Directive 97/13/EC (which allows Member States to introduce individual licensing regimes for telecommunication services subject to certain conditions) are not affected.</td>
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<tr>
<td></td>
<td>The general transparency requirements of the e-commerce proposal apply in all cases whatever the activity of the service provider is and regardless of whether or not contracts are concluded. They supplement the information requirements established in:</td>
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<tr>
<td></td>
<td>- “Distance Selling” Directive 97/7/EC and proposed Directive on distance selling of financial services (COM-98/0468 final): these two instruments establish which information has to be provided in the case of distance contracts.</td>
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<tr>
<td></td>
<td>- Safeguards of Companies Directive 68/151/CEE: deals with the registration of commercial enterprises and requires companies to indicate their registration number, legal form and headquarters' location in commercial letters.</td>
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<td></td>
<td>- “Price Indication” Directive 98/6/CE: deals with the indication of the selling price and the unit price of products.</td>
</tr>
<tr>
<td></td>
<td>- Proposal for an electronic signatures directive, COM (98) 29 final: establishes which information has to be figured in qualified certificates.</td>
</tr>
<tr>
<td><strong>Article 6</strong> establishes specific transparency requirements for Information Society services consisting of or including commercial communications.</td>
<td>All existing directives continue to apply, for instance:</td>
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<tr>
<td></td>
<td>- “Misleading Advertising” Directive 84/450/EC: provides for protection against misleading advertising by clarifying the concept of misleading advertising and requires Member States to provide for effective means of control against such advertising.</td>
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<td></td>
<td>- Advertising of Medicinal Products Directive 92/28/EC: bans advertising for prescribed medicinal products to the general public and imposes restrictions on the content of advertising and on sales promotions for other medical products.</td>
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<td></td>
<td>- “Tobacco Advertising” Directive 98/43/EC: provides for a total ban on direct and indirect tobacco advertising.</td>
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<td>Article 7</td>
<td>Article 8</td>
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<tr>
<td>requires that unsolicited commercial communication has to be clearly identified as such.</td>
<td>ensures that rules and regulations relating to commercial communications may not prevent the regulated professions from providing their services on line.</td>
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</table>

The electronic commerce proposal does not address the question of whether the sending of commercial communications requires prior consent (opting in/opting out systems). This issue is addressed in other existing directives:

- **"Data protection" Directive 95/46/EC**: requires Member States to provide a right to object to the processing of personal data for purposes of direct marketing.
- **Personal Data and Privacy in the Telecommunications Sector Directive 97/66/EC**: allows Member States a choice between “opting out” and “opting in” as regard unsolicited calls.
- **"Distance Selling" Directive 97/7/EC, Proposal for a Directive on Distance Selling of Financial Services Directive -COM-98/468 final**: leaves Members States with the possibility of adopting "opting out" or "opting in" systems for use of means of distance communication other than automated calling machines and fax machines.
- **The term of regulated professions used in the e-commerce proposal relies on the definition of the Directive on a general system for the recognition of higher-education diplomas 89/48/CE** (see recital 12 of the e-commerce proposal).
- **The requirements laid down in general and specific directives on regulated professions continue to apply to on line activities.**

**CONTRACTS**

The e-commerce proposal deals with some specific new questions relating to on line contracts such as their validity or the moment at which they are concluded. It does not address questions relating to the content of the contract or information requirements relating to the content of the contract. In this respect existing Community directives continue to apply to on line contracts (for example, "unfair contract terms » Directive 93/13/EC, « distance selling » Directive 97/7/EC, Directive 90/314/EEC on package travel, package holidays and package tours)

**Proposal for a directive on a common framework for electronic signatures COM(98) 297 final**: the e-commerce directive and the proposed directive on electronic signatures are mutually complementary. The electronic signatures directive deals with the legal recognition of electronic signatures. The e-commerce proposal addresses other questions concerning electronic contracting which are not related to signature.

"**Distance Selling" Directive 97/7/EC**: this directive requires the provision of information concerning the contractual offer (main characteristics of goods or services, delivery mode, payment arrangements, rights of withdrawal, etc). The information requirements of the e-commerce proposal, which concern the process of electronic contracting, are complementary to these requirements.
<table>
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<tr>
<th>Article 11 clarifies at what moment a contract is deemed to be concluded.</th>
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<tr>
<td>The second paragraph provides that the service provider shall make available to the recipient of the service appropriate means to correct handling errors.</td>
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</table>

**LIABILITY**

As regards the specific activity of intermediaries (providers transmitting and hosting third party information) the proposal establishes a "mere conduit" exemption (art. 12) and limits liability for other intermediary activities (caching in art. 13 and hosting in art. 14). These limitations do not affect possibilities of injunctive relief.

"Distance Selling" Directive 97/7/EC: this directive refers to the moment when a contract is concluded without however defining when that moment is. The clarification of this question in the e-commerce directive will assist in the application of the "Distance selling" directive.

The possibility to correct handling errors is provided independently from and without prejudice to the right of withdrawal established in the Distance selling Directive.

- These limitations are compatible with other existing or proposed directives addressing or affecting the activity of intermediaries:
  - "Distance Selling" Directive -97/7/EC- and Proposal for a directive on Distance Selling of Financial Services Directive- COM 98/468 final Both instruments require Member States to ensure the possibility of injunctive relief in order to oblige the provider of means of communication to assist in terminating infringements. These obligations are not affected by the e-commerce proposal since the limitations of liability do not concern injunctive relief.
  - The limitations of liability cover all types of infringements including copyright infringements (for example, the violation of the reproduction right which may occur within the context of the activity of intermediaries). The proposal for a directive on copyright and related rights in the information society - COM(97) 628 defines the scope of the different rights but it does not deal with the issue of liability of intermediaries for copyright infringements.
  - The e-commerce proposal does not affect directives which deal with liability in respect of other types of activities i.e. which do not address the specific activity of intermediaries. Examples:
    - "Data protection" Directive 95/46/CE and Directive on personal data and privacy in the telecommunications sector 97/66/EC: Both deal with the liability of the controller of the personal data.
    - Directive on money laundering 91/308/EC : provides for an exemption of any type of liability of financial institutions including their employees for the disclosure of specific information under certain circumstances.
  - Directive on personal data and privacy in the telecommunications sector 97/66/EC: allows Member States to carry out lawful interception of communications for specific reasons. This is not affected by the provisions on liability.

Article 15 prevents Member States from imposing a general monitoring obligation on intermediaries. This does not prevent Member States from imposing on intermediaries a specific obligation to monitor to prevent or to stop infringements.
Table 1

**ENFORCEMENT**

<table>
<thead>
<tr>
<th>Article 16</th>
<th>This approach is coherent with the approach adopted in recent initiatives such as:</th>
</tr>
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<tbody>
<tr>
<td>encourages the establishment of codes of conduct at Community level.</td>
<td>- <em>Recommendation on the protection of minors and human dignity</em> 98/560/CE: establishes guidelines for the development of codes of conduct regarding the protection of minors and human rights.</td>
</tr>
<tr>
<td>- <em>Action Plan on promoting safe use of Internet</em> 56/98/EC: encourages self-regulation and codes of conduct to create a safe Internet environment.</td>
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<tr>
<th>Article 17</th>
<th>The principles in paragraph 2 apply solely to consumer disputes and are already set out in <em>Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes</em>.</th>
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<tr>
<td>requires Member States to remove obstacles for the use of out-of-court dispute settlement mechanisms.</td>
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<td>Its paragraph 2 establishes principles that bodies responsible for out-of-court dispute settlement of consumer disputes shall apply.</td>
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<tr>
<th>Article 18</th>
<th><em>Directive 98/27/EC on injunctions for the protection of consumers' interests</em>: this directive provides, inter alia, that a Member State shall ensure that in the event of an infringement originating in that Member State, any qualified entity from another Member State where the interests protected by that qualified entity are affected by the infringement, may seize the relevant court or administrative body.</th>
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<tr>
<td>requires Member States to ensure the availability of efficient injunctive relief Court actions.</td>
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<tr>
<td>Its paragraph 2 extends the application of Directive 98/27/EC on injunctions for the protection of consumers' interests to cases relating to breaches of articles 5 to 15 of the e-commerce Directive.</td>
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</table>

<table>
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<tr>
<th>CASE BY CASE DEROGATION SYSTEM</th>
<th>- &quot;Television Without Frontiers&quot; Directive 89/84/EC (modified 97/36/EC): the procedure is similar to the derogation regime established by the TVWF Directive. However the conditions to be fulfilled under the TVWF Directive are stricter: derogations are justified only for reasons relating to the protection of minors and the protection against hatred speech; a decision by the Commission is required within two months from the time of notification.</th>
</tr>
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<tbody>
<tr>
<td>- &quot;Transparency&quot; Directive 98/48/EC: this directive establishes a notification procedure for draft national rules. This notification procedure and the notification procedure in the e-commerce proposal are complementary since the notification in the e-commerce proposal concerns individual measures taken case by case whereas the &quot;transparency directive&quot; concerns (general) rules and regulations.</td>
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<tr>
<td>- Article 22-3 gives Member States the possibility to derogate case by case from the principle of free movement of services subject to the fulfilment of certain criteria and subject to the notification of the measure to the Commission.</td>
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</tbody>
</table>
OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Information Society services)
on: 25 February 1999

No. prev. doc.: 6144/99 ECO 57 CONSOM 15 CODEC 86
No. Cion prop.: 5123/99 ECO 2 CODEC 6


1. Introduction


The main comments on these Articles are summarised hereafter.
2. **Comments by delegations and Commission’s clarifications**

a) **Mere conduit (Article 12)**

Whilst accepting the general structure of this Article, most of the delegations expressed the view that the terminology and precise wording of this Article needed to be further clarified, in particular the expressions "the recipient of the service" and "prohibitory injunction".

In response, the Commission representative explained that Article 12 established limitations on the liability of Information Society service providers, when they acted as intermediaries. However, when the service provider is transmitting his own information he cannot be considered to be an intermediary. The expression "recipient of the service" should be understood to cover all persons who were using intermediary activities (e.g. a person who placed information on-line as well as a person who accessed or retrieved such information).

The Commission representative also explained that term "prohibitory injunction" was well established concept, since it has been included in consumer protection Directives. He recalled however, that the practical implementation (form and content) of this legal concept was left entirely to Member States.

Several delegations expressed doubts about the scope of liability in Article 12, with certain of them expressing the view that criminal liability cannot be covered in this Article.

In response, the Commission representative confirmed that this provision covered both civil and criminal liability.

Concerning more specific points:

- The Commission representative answering to question on the relationship between this proposal (Article 12) and copyright proposal, confirmed that there was no conflict between these proposals, since Article 12 applied to the limitations of liability, whereas copyright proposal did not deal with liability issues at all;

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(1) Study reservation by Portugal on all the section.
as a reply to UK query, the Commission representative confirmed that Article 12 did not cover search engines, since they were considered to be only tools in transmission process;

as regards the paragraph 2, several delegations (D, ES, FIN and I) queried what was meant by the expression "reasonably necessary".

b) Caching (Article 13)

Many delegations underlined the importance of clarifying the scope of this Article.

More specifically the following points were raised:

- Certain delegations expressed concern about the relationship between Article 12(2) and 13. The Commission representative explained that there was no conflict between these Articles, since Article 13 referred to temporary forms of storage which was usually undertaken by service provider in order to make transmission of information more effective. The term "storage" in Article 12, on the other hand, referred to storage that did not serve any other purpose than transmitting of information.

- D and FIN queried whether this Article covered proxy caching. The Commission representative explained that Article 13 did not refer to any specific technology.

- A and UK queried what was meant by "rules regarding the updating of information" in (c);

- A, B, ES, I and UK underlined the importance of clarifying what was meant by "industry standards" in (c);

- A, FIN and UK called for clarification on the meaning of expression "actual knowledge" in (e); the Commission representative precised that it meant effective knowledge received from any sources;

- A, B, ES, F and I questioned the relationship between original site and its copy; the Commission representative explained that there was no conflict since they were identical.

In conclusion it was agreed at this stage that the Commission representative will establish an explanatory note on this Article.
(c) **Hosting** (Article 14)

In general delegations were in favour of the principles contained in this Article. (2) Nevertheless, the following clarifications were requested:

- several delegations queried what was meant by "authority or control of the provider", with certain of them suggesting to set up a control mechanism;

- certain delegations expressed concerns on the term "illegal activities" in Article 14(1)(a), with A and UK preferring to use "illicit content" and F, for its part, suggesting to refer to circumstances which will reveal illegal activities.

In response, the Commission representative explained that authority and control of the provider referred to contractual relationship. The Commission representative also explained that the Commission felt that it was more appropriate to encourage industry to set up self-regulatory systems (e.g. hot lines) rather than to introduce control mechanisms in Member States.

Concerning the term "illicit activities", the Commission representative felt that "illegal activities" has a more comprehensive term, since the content (e.g. computer programme) could be legal but the related activity (e.g. copying and distribution of that programme) could be illegal.

On the request of the Presidency, the Commission representative accepted to complete in writing the clarification on this Article.

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(2) However NL and I reiterated their doubts on the coverage of criminal law.
OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Information Society services)
on: 4 March 1999

No. prev. doc.: 6251/99 ECO 68 CONSOM 18 CODEC 97
No. Cion prop.: 5123/99 ECO 2 CODEC 6


Delegations will find hereafter:

- a summary of the discussion on article 15 \(^{(1)}\);

- the document distributed by the Commission services illustrating the definition of Information Society services.

\(^{(1)}\) The Working Party also examined Articles 16 and 17 in the absence of the General Secretariat on account of a stoppage of work decided on by a general meeting of staff.
Article 15: No obligation to monitor

Most of the delegations (B, DK, ES, F, I, IRL, NL, P and UK in particular) expressed the view that the scope and wording of this Article needed to be further clarified. In particular several delegations questioned the interpretation of the term "general obligation". In this context some delegations also expressed the view that service providers should be responsible for the content of the information which they transmit or store, with the I delegation considering that there was a contradiction between this Article and recital 16.

The Commission representative explained that this provision was meant to avoid establishment of a general monitoring obligation on intermediaries. However, this general rule did not affect the possibility of a judicial authority to request a service provider to monitor a specific site during a specific period of time in order to prevent illicit activities. He also pointed out that Article 14(1) was based on the principle of diligence but it was not necessary to introduce a similar principle in Article 15.

The Commission representative also underlined that this Article was not intended to limit action of judicial authorities only to those activities listed in paragraph 2. This list was merely to give examples of activities which cannot be considered as general activities.

Concerning more specific requests, the Commission representative gave the following answers:

- to the question on the omission of a reference to caching in Article 15, he confirmed that the intention of Article 15 was to cover "caching" (Article 13) as well. In this context the President reiterated the request by the Group that the Commission services could establish an explanatory note clarifying technical terms such as mere "conduit", "caching" and "hosting".

- to concerns of several delegations, he precised that the scope of Article 15(2) was not limited just to judicial authorities but it covered also other authorities exercising temporary surveillance activities;

- to A, which queried whether more specified measures (e.g. screening software) could be introduced in order to remove damaging or illegal content, he declared that Article 15 did not prevent installing filtering software. However, notification or labelling obligation could be tackled better under Internet Action Plan on safer use of Internet;

- to B and GR, concerning the relationship between this Article and the principle of confidentiality, he stated that all the EU measures on confidentiality continued to apply normally;

- to the UK question whether on-line press agencies or data aggregators were covered by this Article, he confirmed that they were not covered by Article 15.
SUMMARY OF PROCEEDINGS

of : Working Party on Economic Questions (Information Society services)

on : 24, 25 and 26 March 1999

No. prev. doc.: 6578/99 ECO 81 CONSOM 20 CODEC 121
No. Cion prop.: 5123/99 ECO 2 CODEC 6


1. Introduction

At its meeting on 24, 25 and 26 March 1999 the Working Party on Economic Questions (Information Society services) continued its first reading of the above proposal, examining Articles 18 to 27 and Annexes I and II.

The main comments and the Commission's explanations on these articles are summarised below.
2. Delegations' comments and the Commission's explanations

(a) Court actions (Article 18)

Several delegations (in particular A/D/ES/F/I/NL and UK) wanted further clarification of the aim and precise wording of this article. Some delegations (A/D/ES and NL) particularly stressed that it was important to clarify what was meant by "effective court actions".

The Commission representative replied that the purpose of the provision was not to create any new lines of procedure but merely to require Member States to verify that all existing measures were reasonable and appropriate. The Commission representative also stated that the term "effective court actions" was defined in Directive 92/13/EC.

More detailed questions:

- on the question of the link between the Article in question and Directive 92/13/EC, the Commission representative confirmed that there was no conflict between them;

- D and ES asked what was meant by "the rapid adoption of interim measures";

- D and UK were of the opinion that paragraph 2 should refer to "consumers' collective interests";

- several delegations (A/DK/FIN/I and UK) wanted to know why paragraph 2 referred to Articles 5 to 15;

- in response to the concern of certain delegations (ES/NL/P and UK) about the numerous translation errors contained in Article 18, the Commission representative stated that the Commission units were prepared to reformulate the other language versions of this Article on the basis of the delegations' comments.
(b) Cooperation between authorities (Article 19)(1)

Several delegations (in particular A/B/DK/ES/F/FIN/EL/I/NL/P/S and UK) felt that the scope and formulation of the Article in question should be clarified further. Several delegations doubted in particular whether Article 19 could be applied in practice. In this connection, some delegations wondered especially about the interpretation of the term "competent authorities".

The Commission representative explained that the purpose of the Article concerned was to give national authorities the necessary means to carry out their task of monitoring Information Society services and to ensure mutual and effective cooperation between Member States. The Commission representative also said that the Member States could themselves determine what might be considered to be "the competent authorities".

Regarding more detailed questions:

- in answer to a question from some delegations (F/IRL/S and UK) regarding the contact person referred to in paragraph 2 of this Article, the Commission representative confirmed that there could be several contact persons, so that a person could be appointed for the purpose in each area of activity;

- some delegations wanted to know how paragraph 3 of this Article could be enforced at national level;

- in answer to the concern of several delegations (in particular A/D/I/NL/P/S and UK) as to what was meant by subparagraph 4(c) of this Article, the Commission representative pointed out that subparagraph (c) was not intended to apply to Member States' arrangements regarding judicial assistance. The Commission representative also stated that the Commission's departments were prepared to clarify the subparagraph in question on the basis of delegations' comments;

- several delegations (in particular A/D/FIN/EL/I/IRL/NL/P and UK) considered that paragraph 5 of the Article imposed an unreasonable notification requirement on Member States;

- regarding paragraphs 6 and 7, several Member States were of the opinion that the Commission could not be given the power to lay down detailed rules on cooperation between national authorities.

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(1) I tabled a reservation on Article 19(3) and (4), and on Article 20.
(c) **Electronic media (Article 20)**

Some delegations took a somewhat doubtful view of the competence of the committee referred to in the Article. The Commission representative said that only purely technical measures were concerned, the purpose of which was to offer protection for communications involving electronic media.

(d) **Sanctions (Article 21)**

In answer to the concern of several delegations (in particular A/B/D/ES/I and UK) about the fact that the Article under discussion laid down fairly detailed provisions on sanctions and follow-up arrangements, the Commission representative explained that the wording of the Article was taken from the Commission communication on sanctions applying in the internal market. The Commission representative also explained that the words "the sanctions they provide for shall be effective, proportionate and dissuasive", used in this Article, came originally from the case law of the European Court of Justice.

(e) **Exclusions and derogations (Article 22)**

Several delegations felt that the structure and formulation of this Article was rather tortuous and inadequate in its present form. In this connection some delegations tabled the following reservations (P: the whole of Article 22; I: Article 22(1); A/I/NL/S: Annex II as referred to in Article 22(2); D: Article 22(3)(b)).

Regarding the paragraph 1 of the Article, several delegations (in particular ES/EL/LUX/NL and P) wanted to know why taxation (subparagraph a) and the general Directive on data protection 95/46/EC (subparagraph b) fell outside the scope of the Directive. In this connection, I stated that financial services should also be left outside the scope of the Directive. Furthermore, several delegations (A/B/ES/FIN/EL/NL/P/S and UK) pointed out that the Commission could not make changes to the activities mentioned in Annex I because changing the scope of the Directive did not fall within the Commission's sphere of competence. With regard to Annex I, many delegations also wanted to know why all notaries' activities had been left outside the scope of the Directive. In addition, some delegations stressed that it was important to clarify what was meant by "gambling activities carried out for commercial communication purposes".
The Commission representative stated that taxation had been excluded from the scope since an internal market issue was not involved. The general data protection Directive was excluded from the scope since full harmonisation already existed in the area in question. With regard to Annex I, the Commission representative explained that notarial activities were excluded from the Directive since the role of the notary varied considerably in the different Member States. He stated that gambling activity which required the player to put up a stake in order to win remained outside the Directive's scope.

Several delegations thought that Annex II (derogations from the country of origin principle) would require closer definition. Some stressed particularly that it was important to explain that the Directive did not restrict the application of international agreements relating to private international law (e.g. the Rome Convention). In this connection, certain delegations also asked why contractual obligations entered into by consumers and life insurance policies were excluded from the scope of Article 3.

The Commission representative stated that the Article in question did not interfere with the provisions of private international law and that the Rome Convention provisions would continue to apply in the normal way. With regard to contractual obligations entered into by consumers, the Commission representative said that a distinction needed to be drawn between general information and particular information. General information did not form part of the contractual obligations, but any particular information determining the content of an agreement or contract did and, as such, belonged in Annex II.

Several delegations asked how the notification requirement referred to in Article 22(3) differed from the corresponding requirement in Directive 48/98/EC. Some delegations were concerned by the connection between the derogations referred to in subparagraph (a) of the Article and the Articles of the EU Treaty.

The Commission representative affirmed that Directive 48/98 contained a general notification requirement, whereas the requirement contained in Article 22(3) concerned information on individual and specific measures. He also made it clear that the derogation provisions contained in the EU Treaty applied only in the absence of harmonisation in the area of legislation in question.
The delegations commented briefly on the final provisions of the Directive. Several expressed misgivings on Article 23 (the tasks of the advisory committee). Some delegations were particularly emphatic that clear legislative powers should not be delegated to the Commission through the committee procedure. In this connection, certain delegations thought that the Council Legal Service should state its opinion on the tasks which it was planned be entrusted to the committee under the Directive and on their conformity with Community law. The delegations stated that the nature of the committee could certainly not be advisory.

All the delegations thought that a one year implementation period for Article 25 (transposition to national legislation) was too short.
OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Information Society services)

on: 15 and 16 April 1999

No. prev. doc.: 7085/99 ECO 114 CONSOM 27 CODEC 160
No. Cion prop.: 5123/99 ECO 2 CODEC 6


At its meeting of 15 and 16 April 1999 the Working Party on Economic Questions (Information Society services) began its second reading of the above-mentioned proposal with the examination of Articles 1, 2(a) and 22(1) as well as Annex I.

The main comments on these Articles are summarised in the attached annex.¹

¹ ES requested that forthcoming documents be made available in all language versions.
Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on certain legal aspects of electronic commerce in the internal market

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.

2 ES, supported by B, P, and S, proposed to replace "electronic commerce" with "Information Society services". D, F, NL and UK, as well as the Cion opposed this change.

3 D entered a scrutiny reserve on this paragraph. B proposed amending the text to read: "This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of Information Society services."

4 A considered the text "to the extent necessary...internal market arrangements" to be superfluous and also proposed the simplification of the final part of the paragraph to read: "...the liability of intermediaries and legal implementation."

5 In response to the concerns raised by NL, the Cion agreed to the deletion of "existing".

6 To meet FIN concerns relating to investment services, the Cion suggested the addition of the words "in particular".

7 UK questioned the treatment of these issues compared to those covered by recitals 24 and 25.

8 A and DK considered that the text should be broadened to include all national legislation consistent with Community acts.

9 Several delegations (A, DK, ES, NL and UK) expressed concern about the relationship between this paragraph and Article 3(2).

7677/99
DG C I
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.

10 DK, FIN and P entered scrutiny reserves on this article.
11 A entered a reserve on this definition.
12 A majority of delegations considered that greater clarity regarding the scope of this definition was needed and a number of options were discussed:
- NL, supported by DK and S, suggested its replacement with a definition of "electronic commerce" worded as follows: "Any activity aimed at a commercial transaction for the supply of goods or services, or the transfer of rights, conducted entirely over public telecommunication networks";
- P and UK suggested adding an annex similar to that found in Directive 98/48 listing the services to be excluded from the scope;
- F, supported by ES, suggested supplementing and reformulating recital 3.
The Cion expressed a clear preference for this third option.
13 A and B expressed concern that the on-line ordering of goods might be excluded.
14 In response to the concerns of several delegations (A, GR, S and UK in particular), the Cion reaffirmed that, according to Article 60 of the Treaty and ECJ caselaw, this term has a broad meaning and includes any service with an economic dimension including those that are free to the end user.
15 A, supported by NL, suggested deleting the text in brackets.
16 NL questioned the usefulness of listing the different means of transmission.
17 A suggested replacing "provided through the transmission of data on individual request" by "made available through interactive networks". The Cion opposed this amendment, explaining the importance of the existing wording as a means of excluding point to multi-point services such as television and broadcasting.

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DG C I
CHAPTER IV
EXCLUSIONS FROM SCOPE AND DEROGATIONS

Article 22

Exclusions and derogations

1. This Directive shall not apply to:
   (a) taxation;\textsuperscript{19}
   (b) the field covered by Directive 95/46/EC of the European Parliament and of the Council;\textsuperscript{20}
   [(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.]\textsuperscript{21}

\textsuperscript{18} D, GR and P entered general reserves and A a scrutiny reserve on this Article. Some delegations considered that the content of Article 22(1) would follow more logically after Article 1.
\textsuperscript{19} ES and NL requested clarification of the scope of this exclusion, perhaps in a recital.
\textsuperscript{20} Certain delegations (NL and P in particular) questioned the need for this exclusion, while UK preferred the formula "without prejudice to Directive 95/46/EC". The Cion opposed deletion but reacted positively to a suggestion from B, supported by A, to add a reference to Directive 97/66/EC.
\textsuperscript{21} All delegations except GR opposed the Commission's power to amend the directive's scope and supported the incorporation of the contents of Annex I into Article 22(1).
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;\(^{22}\)
- the representation of a client and defence of his interests before the courts\(^{23}\);
- gambling activities, excluding those carried out for commercial communication purposes.\(^{24}\)

\(^{22}\)Several delegations had difficulties with this exclusion:
- ES proposed to add "as well as other activities related to official professions which involve the exercise of a legal public power of the state."
- B, FIN, NL and P considered that the exercise of public functions was the key criterion, which should be applicable to both notaries and similar professions. P proposed the following text: "Acts whose validity or effectiveness depends, according to national law, on the involvement of a notary or the creation of a register."

In the light of the discussions the Cion undertook to reformulate this indent.

\(^{23}\)A and D wished to add "before official authorities and in other legal disputes".

\(^{24}\)Several delegations (A, B, D, FIN, and UK) requested clarification that all forms of gambling where a stake is laid (including lotteries and betting) are covered by the text, irrespective of whether commercial communication is involved. The Cion agreed to submit a revised text.

\(^{25}\)Diverse views were expressed on the desirability of further exclusions:
- I requested the exclusion of financial services, while F suggested that such services might be included in Annex II (derogations from Article 3);
- UK opposed special treatment for financial services but suggested an additional exemption worded as follows: "The provision of services for the confidentiality of information when they are covered by national provisions concerned with public policy or public security";
- F, supported by GR and the Cion, warned of the dangers of adding further exclusions.
At its meeting of 29 April 1999, the Working Party on Economic Questions (Information Society services), continued its second reading of the above-mentioned proposal with the examination of Articles 2 and 3.

The main comments on these Articles are summarised in the attached annex.
Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
on certain legal aspects of electronic commerce in the internal market

Article 2(1)
Definitions

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

(a)(2) "Information Society services"(3) any service(4) normally provided for remuneration,(5) at a distance, by electronic means and at the individual request of a recipient of services (6);

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

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(1) P maintained a scrutiny reserve on this article.
(2) A entered a reserve on this definition.
(3) A majority of delegations considered that greater clarity regarding the scope of this definition was needed and a number of options were discussed:
   - NL, with some support from B, DK, GR and S, suggested its replacement with a definition of "electronic commerce worded as follows: "Any activity aimed at a commercial transaction for the supply of goods or services, or the transfer of rights, conducted entirely over public telecommunication networks";
   - A, D, ES, P and UK suggested adding an annex similar to that found in Directive 98/48 listing the services to be excluded from the scope;
   - F, supported by FIN, I, IRL and LUX, suggested supplementing and reformulating recital 3. The Cion expressed a clear preference for this third option.
(4) A and B expressed concern that the on-line ordering of goods might be excluded.
(5) In response to the concerns of several delegations (A, GR, S and UK in particular), the Cion reaffirmed that, according to Article 60 of the Treaty and ECJ caselaw, this term has a broad meaning and includes any service with an economic dimension including those that are free to the end user.
(6) FIN proposed:
   - the addition of "except services, which consist of merely routing or transmitting data over public telecommunication networks (or providing access to such networks)
   - the insertion of a new definition 2a bis: "Carrier/intermediary of an Information Society service": any service provider who merely routes or transmits data in the public telecommunication networks or provides access to these networks" and the appropriate corresponding amendments to Articles 12-13.
of electronic equipment for the processing (including digital compression)(7) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;(8)

- "at the individual request of a recipient of services" means a service provided through the transmission of data on individual request.(9)

(b) "service provider": any natural or legal person(10) providing an Information Society service(11);

(c) "established service provider"(13): a service provider who effectively pursues an economic activity using a fixed establishment(14) for an indeterminate duration.(15) The presence and use of the technical means and technologies required to provide the service do not(16) constitute an establishment of the provider(17);

(7) A, supported by NL, suggested deleting the text in brackets.
(8) NL questioned the usefulness of listing the different means of transmission.
(9) A suggested replacing "provided through the transmission of data on individual request" by "made available through interactive networks". The Cion opposed this amendment, explaining the importance of the existing wording as a means of excluding point to multi-point services such as television and broadcasting. UK, supported by IRL and NL, preferred an explicit exclusion of broadcasting services.
(10) A proposed adding "or other legal body", whilst D, for its part, preferred "or association". The Cion proposed to resolve the problem by verifying the conformity of various language versions with the original French text.
(11) D proposed the following addition:"by making it available for use or providing access to it".
(12) UK proposed the deletion of this definition and of the third "whereas" clause in recital 9, preferring to treat this issue in Article 3. See fn 31.
(13) A proposed substituting this definition with the following: "Establishment": place where the organisational headquarters (or central administration) is located".
(14) ES proposed the addition of "according to the legislation of each Member State".
(15) Several delegations (ES, GR, I, NL and UK) expressed doubts about the term "indeterminate duration", I suggesting its replacement with "for a considerable period of time". The Cion undertook to reflect on this.
(16) Following a proposal from I, it was agreed to insert the words "in themselves".
(17) To clarify the place of establishment, GR and NL proposed the creation of a link with Article 5, whereas D suggested introducing a reference to the place where activities are carried out the longest.
(d) "recipient of the service": any natural or legal person \(^{(18)}\) who, for professional ends or otherwise, uses an Information Society service, in particular for the purposes of seeking information or making it accessible\(^{(19)}\);

(e) \(^{(20)}\) "commercial\(^{(21)}\) communications": any form of communication \(^{(22)}\) 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) \(^{(23)}\) "coordinated field": the requirements applicable to Information Society service providers and Information Society services.

\(^{(18)}\) See fn 10.

\(^{(19)}\) D, NL and UK proposed the deletion of "in particular ... accessible". This was opposed by F and the Cion.

\(^{(20)}\) D entered a reservation on this definition.

\(^{(21)}\) A, with support from ES and S, proposed replacing "commercial" with "electronic".

\(^{(22)}\) FIN, with support from ES, S and UK, proposed replacing "any form of communication" with "Information Society services".

\(^{(23)}\) A majority of the delegations (A, B, D, DK, ES, FIN, IRL, NL, P, S and UK) entered a reservation on this definition. NL suggested the introduction of restriction similar to that found in the "Transparency" Directive (98/48), while D preferred the approach found in the "TV without frontiers" Directive. A proposed restricting the coordinated field to those areas harmonised by this Directive. A number of delegations were concerned about the inclusion of contract law within the coordinated field.
Article 3\textsuperscript{(24)}

Internal market

1. Each Member State shall ensure that the Information Society services provided\textsuperscript{(25)} 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.\textsuperscript{(26)}

2. \textsuperscript{(27)}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.\textsuperscript{(28)}

\textsuperscript{(24)} A, D, NL and S entered reserves and B and F scrutiny reserves on this Article.

\textsuperscript{(25)} ES suggested the addition of "...provided from its territory by a service provider established on it comply with...".

\textsuperscript{(26)} FIN proposed replacing this paragraph with the following:

"1. The provision of information services within this Directive's co-ordinated fields shall be governed by the law, including its rules on private international law, of the member state on the territory of which the service provider is established unless otherwise provided by this directive;

1b. The Member State the law of which is applicable under paragraph 1 shall ensure that the law referred to in paragraph 1 is duly complied with by the service provider."

\textsuperscript{(27)} D suggested adding "Without prejudice to Article 22".

\textsuperscript{(28)} To address the risk of circumvention of national legislation, F, supported by FIN, suggested supplementing the text using the "TV without frontiers" Directive as a model.
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.

(30) NL, with support from A, B, DK, ES, S and UK, suggested the replacement of this paragraph with the following:
"This Article does not prejudice the specific rules on private international law relating to conflicts of law or jurisdiction". In response, the Cion pointed out that the substance of this proposal was already contained in recital 7.

(31) UK proposed, with some initial support from certain delegations, the addition of the following to article 3
"4. Where a service provider is established on the territory of more than one Member state, the Member State responsible under paragraph 1 shall be that where the establishment responsible for the activity in question is located; but where more than one establishment is responsible for the activity or it is not possible to tell which establishment is responsible, the Member State responsible under paragraph 1 shall be that where the service provider has the centre of his activities.

5. The presence and use of technical means and technologies required to provide a service do not in themselves constitute an establishment of its provider".

and the insertion of the following after the first "whereas" clause in recital 9:
"whereas that place is where the service provider effectively pursues an economic activity using a fixed establishment for a duration which is more than temporary; whereas provision must be made for cases in which the service provider is established in more than one Member State".

See also fn 12.
ADDENDUM TO THE OUTCOME OF PROCEEDINGS

from: Working Party on Economic Questions (Information Society services)
dated: 15 and 16 April 1999

No. prev. doc.: 7085/99 ECO 114 CONSOM 27 CODEC 160
No. Cion prop.: 5123/99 ECO 2 CODEC 6


Page 2, footnote 3

Regarding the above footnote the D delegation has indicated that its scrutiny reserve refers to the entirety of Article 1.
EUROPEAN UNION
THE COUNCIL
Brussels, 17 May 1999

8181/99

LIMITE
ECO 175
CONSOM 39
CODEC 257

OUTCOME OF PROCEEDINGS
from: Working Party on Economic Questions (Information Society services)
dated: 6/7 May 1999

No. prev. doc.: 7819/99 ECO 158 CONSOM 36 CODEC 214
No. Cion prop.: 7677/99 ECO 149 CONSOM 35 CODEC 205

At its meeting of 6 and 7 May 1999, the Working Party on Economic Questions (Information Society services) continued its second reading of the above-mentioned proposal with the examination of Annex II (derogations from Article 3) and Articles 4 to 8.

The main comments on these provisions, together with the text of the Commission proposal, are contained in the attached Annex A.

Additionally, several delegations (S, B and D) submitted written proposals for amendments to earlier Articles. These proposals are attached as Annex B.
ANNEX A

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
on certain legal aspects of electronic commerce in the internal market

ANNEX II¹
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 and Directive 96/9/EC 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;³
- Article 44 paragraph 2 of Directive 85/611/EEC;⁴

¹ A, D and NL entered reserves and ES a scrutiny reserve on the contents of this Annex.
² ES wished to see the second, third and fourth indents extended to include all financial services, and, together with F, expressed concern that this directive should not contradict the draft directive on distance selling of financial services.
³ NL queried the need for this indent, whilst A raised concerns regarding its formulation.
⁴ Responding to a suggestion from the FIN delegation, the Cion considered the addition of a reference to the Investment Services directive to be unnecessary, given that this directive was in any case based on the country of establishment principle.
contractual obligations concerning consumer contracts; unsolicited commercial communications by electronic mail, or by an equivalent individual communication.

5 I, with support from A, DK and ES, proposed replacing "obligations" with "relations", so as to include pre-contractual measures. In response to a question from FIN regarding the meaning of Recital 19, the Cion confirmed that "obligations" was not intended to include the pre-contractual phase in any general sense. I suggested the inclusion of a specific reference to the consumer protection directives referred to in Recital 14.

6 UK suggested the addition of a definition of "consumer".

7 Several delegations (B, FIN, GR, NL and S) considered that this indent could be deleted, subject to a reformulation of Article 3(3) along the lines suggested previously by the NL delegation. NL agreed to prepare a paper justifying its earlier proposal, whilst the Cion also undertook to provide a paper on the relationship between Community law and International Private Law.

8 A proposed the addition of the words "the permissability of unsolicited ..." so as to maintain the applicability of the country of origin principle to Article 7 of this directive (see fn 38). The Cion undertook to reflect on this proposal.

9 D proposed deleting "unsolicited", although the Cion warned that this would then exclude web-site advertising from the country of origin principle.

10 Certain delegations (D, ES and NL) questioned whether unsolicited commercial communication was an Information Society service according to Article 2(a) and hence whether a derogation was necessary. LUX, for its part, was concerned about the difficulty of identifying such communication.

11 The inclusion of a reference to Directive 92/28 on the advertising of medicinal products, requested by UK, with support from A, F and P, was considered unnecessary by the Cion given that the sale of prescribed medicines over the Internet was already illegal in all Member States.
CHAPTER II
PRINCIPLES
Section 1: Establishment and information requirements

Article 4
Principle excluding prior authorisation

1. Member States shall lay down in their legislation\textsuperscript{12} that access to the activity of Information Society service provider may not be made subject to prior\textsuperscript{13} 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. \textsuperscript{14}

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.\textsuperscript{15}

\textsuperscript{12} At the request of UK, it was agreed that "shall lay down in their legislation" be replaced by "shall ensure" in this and all subsequent articles using the same formulation.

\textsuperscript{13} A proposed the addition of "specific authorisation".

\textsuperscript{14} ES, supported by a number of delegations, proposed:

- the replacement of this paragraph with the following text: "Member States shall not make the provision of the Information Society services referred to in this Directive subject to prior authorisation"

- the addition of a new recital: "Whereas prior authorisation does not only mean any permission which requires the Information Society service provider concerned to obtain a decision by national authorities before being allowed to provide its services, but also any other measure having the same effect."

\textsuperscript{15} IRL, for its part, suggested the replacement of "the effect of which is to ... authority" by "having equivalent effect". The Cion undertook to reflect on these two proposals.

Following concerns expressed by B and P, the Presidency requested that the Cion formulate a draft recital clarifying the position of hybrid courier services.
Article 5\textsuperscript{16}

General information to be provided

1. Member States shall lay down in their legislation\textsuperscript{17} that Information Society services\textsuperscript{18} shall render easily accessible, in a direct and permanent\textsuperscript{19} manner to their recipients and competent authorities, the following information:\textsuperscript{20}
   (a) the name of the service provider;\textsuperscript{21}
   (b) the address at which the service provider is established;\textsuperscript{22}
   (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\textsuperscript{23} 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;

\textsuperscript{16} D and FIN entered reserves on this Article citing, in particular, concerns about services provided by e-mail and over mobile networks.
\textsuperscript{17} I, supported by A and B, suggested the addition of "without prejudice to other information required by Community law".
\textsuperscript{18} ES, supported by IRL and UK, proposed that this obligation should apply to the service providers rather than the services themselves. A further suggestion by ES, to specify its application to providers "established on their territory" was considered superfluous by the Cion.
\textsuperscript{19} In response to the concerns of several delegations (A, ES, FIN, NL, and UK), the Cion confirmed that "permanent" meant permanently accessible, and not permanently posted.
\textsuperscript{20} IRL and UK considered the list of information items to be excessive for certain types of service. ES, for its part, suggested the addition of "when applicable" after "following information". A requested clarification regarding the language in which the information should be provided.
\textsuperscript{21} Following a request from ES, the Cion confirmed that this was intended to cover names of natural and legal persons, and that the Spanish language version should be amended accordingly.
\textsuperscript{22} ES, with support from A and B, proposed the addition of "physical address. NL, for its part, suggested an explicit link with the concept of "established service provider" in Article 2(c).
\textsuperscript{23} Responding to a suggestion from ES to add "or in any other public register" the Cion suggested resolving the problem by bringing the existing ES text into line with the other language versions.
(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.

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24 A requested the deletion of this sub-paragraph.
25 ES requested an amended formulation to take account of the fact that in Spain a fiscal number is used for VAT purposes.
26 Certain delegations (B and P in particular) were concerned about the relationship of this provision with other directives containing rules on prices, with B suggesting to limit its application to business to business trade. S entered a reserve on the paragraph.
27 A suggested replacing "of" with "given for". The Cion agreed on the substance of this suggestion and will propose a new formulation for the next meeting. A and I also wished to see the inclusion of a recital clarifying that the price quoted should be the gross price.
28 UK preferred the term "clearly" to "accurately" and, both here and in future articles, suggested the replacement of "unequivocally" by "unambiguously".
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.

Several delegations (B, D, DK and NL) wished to see more harmonisation of commercial communications.

D entered a reserve on this article.

A requested that the text make it clear that the obligations of Article 6 fall on Information Society service providers.

Following concerns expressed by UK that the definition of commercial communications was too broad, A suggested the addition of "in the framework of Information Society services". The Cion agreed to propose new wording along these lines at the next meeting.

There was agreement that, as with Article 2(b) and (d), the term "legal person" should cover, in all language versions, groups of persons, associations and other legal bodies.

Responding to concerns expressed by A, B and D regarding the clarity of the term "on whose behalf", the Cion agreed to verify the various language versions.

ES, supported by NL and P, proposed moving "such as discounts, premiums and gifts" to a recital. ES also wished to add a reference to the purpose of the promotion. The Cion agreed to provide a revised formulation of this sub-paragraph in the light of the European Parliament's amendments.

Following comments from the A and UK delegations, the Presidency invited the Cion to table a new formulation, perhaps in the form of a recital, clarifying that "promotional competitions and games" did not cover either gambling or electronic games not used for promotional purposes.
Article 7\textsuperscript{37}

Unsolicited commercial communication

38 Member States shall lay down in their legislation that unsolicited commercial communication by electronic mail\textsuperscript{39,40} must be clearly and unequivocally identifiable as such as soon as it is received by the recipient.

\textsuperscript{37} D and I entered reserves on this Article.

\textsuperscript{38} Some delegations (A, DK, I, and NL) proposed the creation of a Community-wide ban on 'spamming' without prior consent, on the basis of which the country of origin principle could apply (the final indent of Annex II being deleted). ES, F, IRL, P and UK, as well as the Cion, opposed this, preferring to maintain the status quo (minimum harmonisation on the basis of 'opt-out'). Regarding the extent to which Article 3 could apply to Article 7 (as currently formulated), the Cion agreed to explore the A proposal set out in fn 8.

\textsuperscript{39} ES suggested the replacement of "mail" by "means". In response to a question from FIN, the Cion confirmed that the existing formulation also covered mail received over mobile networks.

\textsuperscript{40} ES proposed to add "when the recipient has not stated his clear express opposition to receiving this type of communication", with a view to covering business-to-business communication. The Cion considered this to be already covered by the telecoms data protection directive (97/66/EC), but could agree to the addition of "where authorised".
Article 81

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.

41 A, B, D, LUX and NL entered reserves and P a scrutiny reserve on this Article. A suggested its deletion.

42 F proposed modification of the title to read "Regulated activities", whilst UK expressed its wish to see a definition of "regulated professions".

43 A number of delegations considered that the text did not adequately distinguish commercial communication from the provision of services. The Cion undertook to reflect on the following proposal for reformulation suggested by the B delegation: "Member States shall provide in their legislation that the use of (F text "recours à") commercial communication is authorised to the extent necessary for the provision by regulated professions of Information Society services provided that ...".

44 I entered a reserve on paragraphs 2 and 3 of this Article.

45 Certain delegations (A, ES I and NL) considered that the contents of this paragraph would be more suited to a recital. ES, supported by NL, suggested replacing "encourage" with "support and encourage the initiatives of".

46 Only F, P and UK could agree to a role for the Commission in this regard, and this would be subject to an agreement on the form of comitology. A majority of delegations favoured deletion of the paragraph, with IRL and S entering reserves.
1) Proposal from the Swedish delegation

Add the following paragraph to Article 1:
"4. This Directive is not intended to apply to national rules relating to fundamental rights, such as constitutional provisions concerning freedom of expression and, more particularly, freedom of the press."

2) Proposal from the Belgian delegation

Replace the existing Article 2(a) with the following:
"electronic commerce: any activity for the supply, at a distance, of goods or services by electronic means and at the individual request of a recipient of services;
For the purposes of this definition:
(unchanged)"
"commerce électronique: toute activité relative à la fourniture à distance de biens ou de services par voie électronique et à la demande d'un destinataire de service;
aux fins de la présente définition:
(-inchangé)"

3) Proposal from the German delegation

Add the following to Article 3:
"4. Member States shall remain free to require service providers established on their territory to comply with more details or stricter rules in the areas covered by this Directive. Article 4 and Articles 12-15 remain unaffected."
OUTCOME OF PROCEEDINGS

of: Working Party on Consumer Protection and Information
on: 15 March 1999
No. Cion prop.: 5123/99 ECO 2 CODEC 6

At its meeting on 15 March 1999 the Working Party held an exchange of views on the consumer aspects of the above proposal.

1. The Chairman of the Working Party on Economic Questions (Information Society Services) reported on the progress of the discussions of his Working Party, and said that the Working Party, which had not yet completed its first reading of the Articles of the proposal, would take account as far as possible of consumer protection interests.

2. The overwhelming majority of delegations took the view that the current text of the Commission proposal was not clear enough from a consumer policy point of view and that it did not take sufficient account of consumer interests.
The delegations drew attention to the following issues:

(a) Rules on electronic commerce must not compromise consumer protection. What applied off-line must not lose its validity on-line. Technology-neutrality (i.e. neutrality with regard to the medium) must be guaranteed.

Some delegations pointed out that the new Directive must ensure a viable market and must not compound the existing difficulties in implementing consumer directives.

(b) The country of origin principle (Article 3) could be a suitable basis for the establishment of an internal market, by making provision for the authorisation and supervision of firms by the State of establishment, and thus possibly also for business-to-business relations, but it could not be applied automatically to business-to-consumer relations, and certainly not to contractual obligations arising from transactions between service providers and consumers. In that respect the approach adopted in Article 3 was incompatible with the minimum harmonisation approach adopted in existing consumer directives.

(c) The text of the future directive would have to be much clearer and rules applicable to consumers much more transparent, so that consumers could develop real confidence in electronic commerce. That applied in particular to Articles 2, 3, 5, 6, 7, 11 and 22 in conjunction with Annexes I and II.

3. The Working Party agreed to inform the Working Party on Economic Questions (Information Society Services) of the outcome of the discussion and to continue the exchange of views with the Chairman of that Working Party at the appropriate time.
At its meeting of 20 and 21 May 1999, the Working Party on Economic Questions (Information Society services) continued its second reading of the above-mentioned proposal with the examination of Articles 9 to 12.

The main comments on these articles, together with the text of the Commission proposal, are contained in the attached Annex A.

Additionally, several delegations (A, ES, F, and FIN) submitted written proposals for amendments to other provisions which are attached as Annex B, and the Cion submitted revised formulations for Articles 4 to 8 which are set out in Annex C.
Section 3  Electronic contracts

Article 9¹

Treatment of electronic contracts

1.² Member States shall ensure that their legislation allows³ contracts to be concluded electronically⁴. 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.⁵

¹ D entered a reserve and IRL a scrutiny reserve on this article, while A entered a reserve only on paragraph 1.
² ES and P queried whether this article was consistent with Article 7 of the proposed Directive on distance selling of financial services.
³ A proposed adding the words "legally binding".
⁴ UK proposed that the first sentence be reformulated to read: "Member States shall ensure that [...] contracts may be concluded by electronic means." The Cion was sympathetic to this. ES, for its part, preferred the formulation: "Member States shall ensure that their legislation does not dissuade the conclusion of commercial contracts by electronic means".
⁵ Several delegations (A, ES, NL and S) doubted the usefulness of the second sentence with S, supported by D, suggesting the deletion of the words "prevent the effective use of electronic contracts". A number of delegations expressed the desire to adopt an approach similar to that found in Article 5 of the draft electronic signatures Directive.
⁶ S proposed the following addition: "1bis: Member States may lay down provisions that exclude the possibility to conclude contracts electronically if the purpose of those provisions is that they should perform a warning function in connection with a significant legal act and this purpose can not be fulfilled properly if it is permitted to conclude contracts 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.

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7. **NL** and **UK** considered that exemptions in this paragraph, if needed at all, should be as narrow as possible.

8. **ES** proposed the addition of "or other public official", whilst **A**, supported by **D**, suggested the following formulation: "(a) Contracts which in order to be valid require sworn notification or the act of a notary."

9. A number of text proposals were made regarding this sub-paragraph:
   - **I**: "contracts which may be registered with a public authority";
   - **ES**: "contracts which in order to be valid or to have effects on third parties are required ...";
   - **A**: "contracts which for inclusion in a register require official validation or an act of a notary";
   - **D**: "contracts... public authority or other public organisation".

10. **S**, with support from **FIN**, suggested replacing this sub-paragraph with the following: "contracts that create or transfer rights concerning real estate". **ES** also wished to see a specific reference to property rights.

11. **ES** proposed the addition of the words "or legal acts" after "contracts" in sub-paragraphs (c) and (d) to cover adoptions etc.

12. In response to a question from **P**, the **Cion** confirmed that marriage contracts, although not necessarily pre-nuptial agreements, would be outside the scope of the Directive.

13. Several proposals were made for new exemptions to be included in paragraph 2:
   - **P** suggested "contracts which according to national law, require the physical presence of the persons involved."
   - **A** and **D** wished to see a new sub-paragraph covering guarantees made in respect of loans.
   - **D**, with some support from **ES** and **FIN**, wished to see employment contracts excluded.

14. A majority of delegations favoured the deletion of this paragraph. The **Cion** indicated that this would be acceptable subject to a satisfactory agreement on paragraph 2.

15. Following concerns expressed by the **I** delegation, **A** suggested the deletion of "the categories of contracts covered by". **B**, however, preferred to delete the paragraph entirely.
**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.**

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15 D entered a reserve and IRL a scrutiny reserve on this article.
16 In response to the concerns of several delegations, the Cion undertook to reformulate the text so as to clarify that it applied only to web-sites.
17 I, supported by ES and F, proposed the addition of "without prejudice to other information required by Community law".
18 In response to the concerns expressed by ES and UK, the Cion undertook to clarify the notion of "professional persons".
19 A and D proposed the addition of "technical" before "manner".
20 It was agreed to replace "unequivocally" with "unambiguously". ES also suggested the addition of "comprehensibly".
21 D proposed reformulating this sub-paragraph as follows: "the technical functions which have to be performed to convey and receive declarations by electronic means".
22 A number of drafting points were made regarding these sub-paragraphs:
   - in (b) "filed" should read "stored";
   - in (c) "expedients" should be replaced by "means" and "handling" by "input".
23 A, supported by NL, suggested adding "by the Information Society service provider". F, for its part, suggested a reformulation as follows: "the modalities for the filing of the contract and its accessibility".
24 D proposed the addition of "prior to transmitting the declaration".
25 F proposed adding "(d) the languages offered for the conclusion of the contract."
26 In response to concerns expressed by A and D, the Cion undertook to clarify, perhaps in a recital, that this paragraph only concerns technical aspects. FIN and NL considered that the contents of the paragraph might be better dealt with in either Article 11 (FIN) or Article 10(1) (NL).
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;

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27 UK, supported by FIN and NL, proposed that the obligation on Member States should be merely one of encouragement to service providers.

28 A proposed the addition of "existing", whilst D suggested "relevant".

29 B suggested including this paragraph in Article 5, whilst D proposed the addition of a recital relating to the cost implications of this paragraph and Articles 5 and 6.

30 D entered a reserve and IRL a scrutiny reserve on this article, while A entered a reserve on paragraph 1. Certain delegations (D, DK and S) expressed doubts regarding the necessity of the article.

31 Differing views were expressed regarding this paragraph. IRL, UK and LUX were broadly content with the Cion proposal, while a further group of delegations (B, ES, F, GR, I and P) were in favour of a degree of harmonisation on this point. Other delegations (A, D, DK, FIN, NL, and S), however, were reluctant to intervene in areas of traditional contract law. In the light of the discussion the President invited the Cion to take contact with delegations and draw up a number of options.

32 UK suggested simplifying the text as follows: "... in cases where a recipient is required to accept a service provider's offer through technical means,...". The Cion undertook to reformulate the paragraph so as to clarify that it applied principally to web-sites.

33 ES proposed the addition of "or mechanisms for electronic signature".

34 ES suggested adding "without prejudice to those rules governing its finalisation and implementation".

35 It was agreed to replace "electronically" with "by electronic means".

36 There was a broad agreement among delegations and the Cion to delete this indent.
(c) acknowledgment of receipt by the service provider and confirmation of the service recipient shall be sent as quickly as possible.37

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.38

Section 439 Liability of intermediaries40

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:

37 ES proposed an additional sentence reading: "Any delay exceeding that which is usual in this form of commerce shall generate a liability and an obligation to reimburse any damage incurred."

38 It was agreed to reformulate the end of the sentence as follows: "...appropriate technical means allowing him to identify and rapidly to correct input errors." It was also agreed to add a reference specifying that such means be made available prior to finalisation of the contract. I, for its part, requested an addition granting the possibility for the recipient to be able to print the contract in permanent form.

39 D, ES, FIN, IRL, NL and UK entered scrutiny reserves on the entirety of this section and I a reserve on Article 12. Following earlier requests from a number of delegations, the Cion submitted a working paper providing technical details of the types of activities referred to in Articles 12 to 15 (see Working Doc. 4/99). A and NL proposed combining Articles 12 and 13, whilst the Cion insisted on the need for separate articles.

40 F proposed the following definition of the term "intermediary": "any service provider who is involved in electronic communications, such as the one who gives access to the communication network or is in charge of transmitting, caching or hosting information conveyed via the communication network."

41 FIN recalled its own similar proposal (see Doc 7819/99 fn. 6), which was supported by NL. It was agreed to replace "the" with "a".
(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.

42 I, supported by A, ES and NL, proposed inserting the following sub-paragraphs prior to (a):

"(x) 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
(y) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; or"

The Cion preferred to clarify in a recital that Article 12 would not cover cases where network operators collaborate with content providers.

43 In response to concerns raised by NL and UK, the Cion proposed the following addition: "... or modify the content of the information..."
Text Proposals Submitted by Individual Delegations

1) **Proposal from the Spanish delegation**

(7bis): Whereas this Directive does not aim to establish specific rules on fiscal obligations; whereas this Directive may not affect the development of future directives or, should the case arise, any regulations through which Community law aims to regulate fiscal aspects of electronic commerce.

2) **Proposal from the Finnish and French delegations**

Add the following recital
(9bis) Whereas the Court of Justice has constantly held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of its activity to the territory of the first Member State, if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had it been established on the territory of the first Member State;

3) **Proposals from the Austrian delegation**

Article 1(3)

This directive complements Community law applicable to Information Society services without prejudice to the existing level of protection, in particular of public health and consumer protection, which was established by different Community instruments and national statutory and administrative provisions corresponding to the same, including those adopted for the functioning of the Internal Market. In addition, this directive is without prejudice to other Community regulations to the extent they are applicable to Information Society services.

Article 2

For the purpose of this directive,
(a) "information society services" shall mean any service provided as a gainful activity, electronically, at a distance and at the individual request of a recipient of services and/or via inter-active networks, with the exception of telecommunication services within the meaning of Directive 97/51/EC of the European Parliament and the Council as well as broadcasting services within the meaning of Directive 98/84/EC of the European Parliament and the Council;
For the purpose of this definition:

- "service provided at a distance": a service which is made available without the parties being simultaneously present;
- "service provided by electronic means": a service which is sent initially and received at its destination by means of electronic equipment for the processing [(...)] and storage of data and which is entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- "service provided at the individual request of a recipient of services": a service which is made available through the transmission of data on individual request;
- "service provided via inter-active networks": a service the contents of which, which have been transmitted to the recipient of services, are substantially determined by the entries made by the recipient of the services;

(b) "service provider" shall mean any natural or legal person or any other legal entity making available an information society for commercial purposes;

c) "recipient of the service" shall mean any natural or legal person or any other legal entity who, for professional or other ends, uses an information society service [...];

e) "electronic commercial communication" shall mean any form of communication which, within the scope of information society services, are designed to promote, directly or indirectly, the sale of goods and services or the image of a business enterprise, any other organisation or a natural person pursuing a commercial industrial or craft activity or a profession.

The following do not as such constitute a form of commercial communications:

- information exclusively allowing direct access to the activity of the business enterprise, organisation or person, such as, in particular a domain name or an e-mail address;

- information relating to goods and services or the image of a business enterprise, an organisation or a person compiled by the same in an independent manner, in particular without financial consideration;

(f) "coordinated field" [to be elaborated].

Article 3

3. This directive [is without prejudice to] does not affect the provisions of private international law relating to conflicts of law or jurisdiction.
ANNEX III

Indicative list of services not covered by the directive:

1. Services not provided at a distance;
   - Services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices
     (a) medical examinations or treatment at a doctor; surgery using electronic equipment where the patient is physically present;
     (b) consultation of an electronic catalogue in a shop with the customer on site;
     (c) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers;
     (d) electronic games made available in a video-arcade where the customer is physically present.

2. Services not provided by electronic means;
   - Services having material content even though provided via electronic devices:
     (a) automatic cash or ticket dispensing machines (banknotes, rail tickets)
     (b) access to road networks, car parks, etc, charging for use, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment is made,
   - Off-line services: distribution of CD roms or software on diskettes,
   - Services which are not provided via electronic processing/inventory systems:
     (a) voice telephony services;
     (b) telefax/telex services;
     (c) services provided via voice telephony or fax;
     (d) telephone/telefax consultation of a doctor;
     (e) telephone/telefax consultation of a lawer;
     (f) telephone/telefax direct marketing.

3. Services not supplied at the individual request of a recipient of services;
   - Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):
     (a) television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC;
     (b) radio broadcasting services;
     (c) (televised) teletext.
4.
(a) digital telephony (ISDN network, mobile telephone networks)
(b) voice mail boxes
(c) electronic answering machines
(d) telefax machines with data storage
(e) telefax with memory
(f) telefax on demand
(g) Internet telephony
(h) pay-TV
(i) pay-radio services
(j) Internet TV (to the extent the signals are not modified by the recipient of the services)
(k) Web-casting
(l) Internet radio
(m) (mere) video on demand (unless inter-active)
(n) video near on demand
(o) audio on demand
(p) music on demand
Proposals from the Commission's services for reformulations of Articles 4 to 8

Article 4

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

(wheras the Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not cover a postal service consisting of the physical delivery of a printed e-mail message)

Article 5

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

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

[...]

(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, or equivalent means of identification, in that register;

[...]

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Council Directive 77/388/EEC as amended by the Council Directive 80/98/EC VAT number under which he is registered with his fiscal administration.

2. Member States shall lay down in their legislation ensure that, where Information Society services refer to prices, of Information Society services these are to be indicated accurately clearly and unequivocally, unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

44 OJ No L 145 13/06/77
45 OJ No L 281 17/10/98
Article 6

Member States shall lay down in their legislation ensure that commercial communication which is part of or constitutes an Information Society service shall comply with the following conditions:

[...]

(c) promotional offers, such as discounts, premiums and gifts, where authorised, in the Member State where 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 clearly and unequivocally unambiguously;

(d) promotional competitions or games, where authorised in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented accurately clearly and unequivocally unambiguously.

(in addition a recital will clarify the distinction between the promotional competitions and games referred to in this article and gambling activities as referred to in Annex 1)

Article 7

Member States which authorise shall lay down in their legislation that unsolicited commercial communication by electronic mail, shall ensure that such commercial communication by a service provider established in their territory shall be must be identifiable clearly and unequivocally unambiguously identifiable as such as soon as it is received by the recipient.
Article 8

1. Member States shall lay down in their legislation relating to ensure that the use of commercial communication is authorised in order to allow the provision of Information Society services 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 commercial communication 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, and in cooperation with professional associations and bodies, the information referred to in paragraph 2.
I. Introduction


This proposal builds upon and completes a number of other initiatives (regulatory transparency mechanism, protection of personal data, legal protection of conditional access services, electronic signatures) that together will eliminate the remaining legal obstacles to the on-line provision of services, and thereby optimise the benefits of electronic commerce for both citizens and industry in the European Union. Adoption of the Directive would also reinforce the position of the Community in the on-going international discussions on the legal framework for electronic commerce at global level.

The Council began examining the proposal in December 1998. After an initial phase of general discussions intended to clarify the scope of the proposed provisions and to identify the main problems of delegations, the Working Party moved onto a second phase involving detailed examination of text.

The European Parliament and the Economic and Social Committee have also undertaken an examination of the proposal, delivering their opinions on 6 May 1999 and 29 April 1999 respectively.
II. **Commission proposal**

The Commission has proposed to improve the coherence of the legal framework for electronic commerce in the European Union by:

(i) clarifying the application of key Internal Market principles (the establishment of Service Providers and the free movement of services) to Information Society services; and

(ii) supplementing the existing body of Community law with additional harmonisation of certain specific legal aspects related to such services including:

- commercial communications (advertising, direct marketing, etc);
- the on-line conclusion of contracts;
- the liability of intermediaries;
- the enforcement and implementation of the legal framework.

These measures are intended to remove all legal obstacles resulting from divergent or overlapping Member State legislation and thereby guarantee, in conjunction with the existing *acquis*, the free movement of on-line services within the Community.

III. **Delegations' main reactions**

Delegations have generally welcomed the Commission initiative. All Member States have shown themselves to be in favour of establishing a clear regulatory framework for electronic commerce at Community level and support the application of Internal Market principles.

On the detailed content of the proposal, many delegations are still in the process of formulating a definitive position. Discussions in the Working Party have, however, highlighted the following main problems:

- the scope of the services covered by the Directive, and the extent of both the general exemptions and those covering the specific provisions on the country of origin principle and free movement of services;
the use of comitology in particular as a means to alter the scope of derogations (which is opposed by almost all delegations);
- the relationship of the Directive with existing Community law (particularly consumer protection directives) and with other international instruments such as those dealing with International Private Law (principally the 1980 Rome Convention);
- the provisions on commercial communication and in particular whether the Directive should do more to harmonise rules regarding unsolicited e-mail;
- the nature of the derogations from the principle that electronic contracts should have equivalent status to written contracts, and the feasibility of harmonising national provisions on the moment at which on-line contracts are concluded;
- the impact of the provisions limiting the liability of intermediaries on existing national liability regimes (in particular as regards criminal liability), and the appropriateness of these provisions (particularly given the implications for intellectual property rights);
- the degree of administrative cooperation which should be established between Member States.

IV. Current state of work within the Council

The work at group level has been intensive*. After an initial round of general observations, the Presidency undertook a second reading of the text during which delegations were encouraged to propose specific amendments to address their concerns.

The results of this second reading, to be found in the annexes to this document, provide a comprehensive basis for the continuation of work under the incoming (Finnish) Presidency, with the aim of moving towards a common position.

* It is to be noted that 1 three day meeting, 4 two day meetings and 6 one day meetings of the Working Party were held under the German Presidency.
ANNEX A

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on certain legal aspects of electronic commerce in the internal market

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.

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1 D, DK and UK entered parliamentary scrutiny reserves on the text of the proposal.
2 ES, supported by B, P, and S, proposed to replace "electronic commerce" with "Information Society services". D, F, NL and UK, as well as the Cion opposed this change.
3 D entered a scrutiny reserve on this article.
4 B proposed amending the text to read: "This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of Information Society services."
5 A considered the text "to the extent necessary...internal market arrangements" to be superfluous and also proposed the simplification of the final part of the paragraph to read: "...the liability of intermediaries and legal implementation."
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 level of protection for public health and consumer interests, as established by Community acts, including those adopted for the functioning of the Internal Market.

P maintained a scrutiny reserve on this article.

A entered a reserve on this definition and proposed alternative text (see Annex B).

A majority of delegations considered that greater clarity regarding the scope of this definition was needed and a number of options were discussed:

- NL, with some support from B, DK, GR and S, suggested its replacement with a definition of "electronic commerce". NL proposed the following wording: "Any activity aimed at a commercial transaction for the supply of goods or services, or the transfer of rights, conducted entirely over public telecommunication networks" whilst B preferred: "any activity for the supply, at a distance, of goods or services by electronic means and at the individual request of a recipient of services";
- A, D, ES, P and UK suggested adding an annex similar to that found in Directive 98/48 listing the services to be excluded from the scope (see Annex B);
- F, supported by FIN, I, IRL and LUX, suggested supplementing and reformulating recital 3.

The Cion expressed a clear preference for this third option.

A and B expressed concern that the on-line ordering of goods might be excluded.

In response to the concerns of several delegations (A, GR, S and UK in particular), the Cion reaffirmed that, according to Article 60 of the Treaty and ECJ caselaw, this term has a broad meaning and includes any service with an economic dimension including those that are free to the end user.
distance, by electronic means and at the individual request of a recipient of services 17;

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)\(^{18}\) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;\(^{19}\)

- "at the individual request of a recipient of services" means a service provided through the transmission of data on individual request.\(^{20}\)

\(^{(b)}\) "service provider": any natural or legal person \(^{21}\)providing an Information Society service\(^{22}\);
(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.

UK proposed the deletion of this definition and of the third "whereas" clause in recital 9, preferring to treat this issue in Article 3. See fn 42.

A proposed substituting this definition with the following: "Establishment": place where the organisational headquarters (or central administration) is located.

ES proposed the addition of "according to the legislation of each Member State".

Several delegations (ES, GR, I, NL and UK) expressed doubts about the term "indeterminate duration", suggesting its replacement with "for a considerable period of time". The Cion undertook to reflect on this.

Following a proposal from I, it was agreed to insert the words "in themselves".

To clarify the place of establishment, GR and NL proposed the creation of a link with Article 5, whereas D suggested introducing a reference to the place where activities are carried out the longest.

See fn 21.

D, NL and UK proposed the deletion of "in particular ... accessible". This was opposed by F and the Cion.

D entered a reservation on this definition.

A, with support from ES and S, proposed adding the word "electronic" before "commercial".

FIN, with support from ES, S and UK, proposed replacing "any form of communication" with "Information Society services".
"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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34 A majority of the delegations (A, B, D, DK, ES, FIN, IRL, NL, P, S and UK) entered a reservation on this definition. NL suggested the introduction of restriction similar to that found in the "Transparency" Directive (98/48), while D preferred the approach found in the "TV without frontiers" Directive. A proposed restricting the coordinated field to those areas harmonised by this Directive. A number of delegations were concerned about the inclusion of contract law within the coordinated field.

35 A, D, NL and S entered reserves and B and F scrutiny reserves on this article.

36 ES suggested the addition of "...provided from its territory by a service provider established on it comply with...".

37 FIN proposed replacing this paragraph with the following:

"1. The provision of information services within this Directive's co-ordinated fields shall be governed by the law, including its rules on private international law, of the member state on the territory of which the service provider is established unless otherwise provided by this directive;"

1b. The Member State the law of which is applicable under paragraph 1 shall ensure that the law referred to in paragraph 1 is duly complied with by the service provider."

38 D suggested adding "Without prejudice to Article 22".

39 To address the risk of circumvention of national legislation, E and FIN suggested adding the following recital: "(9a) Whereas the Court of Justice has constantly held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of its activity to the territory of the first Member State, if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had it been established on the territory of the first 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.

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40 F proposed replacing "provisions set out in" with "national provisions adopted pursuant to".

41 NL, with support from A, B, DK, ES, S and UK, suggested the replacement of this paragraph with the following:

"This Article does not prejudice the specific rules on private international law relating to conflicts of law or jurisdiction". In response, the Cion pointed out that the substance of this proposal was already contained in recital 7.

42 UK proposed, with some initial support from certain delegations, the addition of the following to article 3

"4. Where a service provider is established on the territory of more than one Member state, the Member State responsible under paragraph 1 shall be that where the establishment responsible for the activity in question is located; but where more than one establishment is responsible for the activity or it is not possible to tell which establishment is responsible, the Member State responsible under paragraph 1 shall be that where the service provider has the centre of his activities.

5. The presence and use of technical means and technologies required to provide a service do not in themselves constitute an establishment of its provider".

and the insertion of the following after the first "whereas" clause in recital 9:

"whereas that place is where the service provider effectively pursues an economic activity using a fixed establishment for a duration which is more than temporary; whereas provision must be made for cases in which the service provider is established in more than one Member State".

See also fn 23.

43 D proposed the addition of the following additional paragraph to Article 3, although this was opposed by F and the Cion: "4. Member States shall remain free to require service providers established on their territory to comply with more details or stricter rules in the areas covered by this Directive. Article 4 and Articles 12-15 remain unaffected."
CHAPTER II
PRINCIPLES

Section 1: Establishment and information requirements

Article 4
Principle excluding prior authorisation

1. Member States shall lay down in their legislation\(^{44}\) that access to the activity of Information Society service provider may not be made subject to prior\(^{45}\) 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. \(^{46}\)

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. \(^{47}\)

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\(^{44}\) It was agreed that "shall lay down in their legislation" be replaced by "shall ensure" in this and all subsequent articles using the same formulation.

\(^{45}\) A proposed the addition of "specific authorisation".

\(^{46}\) ES, supported by a number of delegations, proposed:
- the replacement of this paragraph with the following text: "Member States shall not make the provision of the Information Society services referred to in this Directive subject to prior authorisation"
- the addition of a new recital: "Whereas prior authorisation does not only mean any permission which requires the Information Society service provider concerned to obtain a decision by national authorities before being allowed to provide its services, but also any other measure having the same effect."

\(^{47}\) IRL, for its part, suggested the replacement of "the effect of which is to ... authority" by "having equivalent effect". The Cion undertook to reflect on these two proposals.

Following concerns expressed by B and P, the Presidency requested that the Cion formulate a draft recital clarifying the position of hybrid courier services.
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;
(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;

D and FIN entered reserves on this article citing, in particular, concerns about services provided by e-mail and over mobile networks.
I, supported by A and B, suggested the addition of "without prejudice to other information required by Community law".
ES, supported by IRL and UK, proposed that this obligation should apply to the service providers rather than the services themselves. A further suggestion by ES, to specify its application to providers "established on their territory" was considered superfluous by the Cion.

In response to the concerns of several delegations (A, ES, FIN, NL, and UK), the Cion confirmed that "permanent" meant permanently accessible, and not permanently posted.
IRL and UK considered the list of information items to be excessive for certain types of service. ES, for its part, suggested the addition of "when applicable" after "following information". A requested clarification regarding the language in which the information should be provided.

Following a request from ES, the Cion confirmed that this was intended to cover names of natural and legal persons, and that the Spanish language version should be amended accordingly.
ES, with support from A and B, proposed the addition of "physical address. NL, for its part, suggested an explicit link with the concept of "established service provider" in Article 2(c).
Responding to a suggestion from ES to add "or in any other public register" the Cion suggested resolving the problem by bringing the existing ES text into line with the other language versions.
(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;

56 A requested the deletion of this sub-paragraph.

57 ES requested an amended formulation to take account of the fact that in Spain a fiscal number is used for VAT purposes.

58 Certain delegations (B and P in particular) were concerned about the relationship of this provision with other directives containing rules on prices, with B suggesting to limit its application to business to business trade. S entered a reserve on the paragraph.

59 A suggested replacing "of" with "given for". The Cion agreed on the substance of this suggestion and will propose a new formulation for the next meeting. A and I also wished to see the inclusion of a recital clarifying that the price quoted should be the gross price.

60 UK preferred the term "clearly" to "accurately" and, both here and in future articles, suggested the replacement of "unequivocally" by "unambiguously".

61 Several delegations (B, D, DK and NL) wished to see more harmonisation of commercial communications.

62 D entered a reserve on this article.

63 A requested that the text make it clear that the obligations of Article 6 fall on Information Society service providers.

64 Following concerns expressed by UK that the definition of commercial communications was too broad, A suggested the addition of "in the framework of Information Society services". The Cion agreed to propose new wording along these lines (see Annex B).
the natural or legal person\textsuperscript{65} on whose behalf\textsuperscript{66} the commercial communication is made shall be clearly identifiable;

promotional offers, such as discounts, premiums and gifts\textsuperscript{67}, 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;

promotional competitions or games\textsuperscript{68}, where authorised, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented accurately and unequivocally.

\textit{Article 7\textsuperscript{69}}

\textbf{Unsolicited commercial communication}

Member States shall lay down in their legislation that unsolicited commercial communication by electronic mail\textsuperscript{71}\textsuperscript{72} must be clearly and unequivocally identifiable as such as soon as it is received by the recipient.

\textsuperscript{65} There was agreement that, as with Article 2(b) and (d), the term "legal person" should cover, in all language versions, groups of persons, associations and other legal bodies.

\textsuperscript{66} Responding to concerns expressed by A, B and D regarding the clarity of the term "on whose behalf", the Cion agreed to verify the various language versions.

\textsuperscript{67} ES, supported by NL and P, proposed moving "such as discounts, premiums and gifts" to a recital. ES also wished to add a reference to the purpose of the promotion. The Cion has provided a revised formulation of this sub-paragraph in the light of the European Parliament's amendments (see Annex B).

\textsuperscript{68} Following comments from the A and UK delegations, the Presidency invited the Cion to table a new formulation, perhaps in the form of a recital, clarifying that "promotional competitions and games" did not cover either gambling or electronic games not used for promotional purposes.

\textsuperscript{69} D and I entered reserves on this article.

\textsuperscript{70} Some delegations (A, DK, I, and NL) proposed the creation of a Community-wide ban on 'spamming' without prior consent, on the basis of which the country of origin principle could apply (the final indent of Annex II being deleted). ES, F, IRL, P and UK, as well as the Cion, opposed this, preferring to maintain the status quo (minimum harmonisation on the basis of 'opt-out'). Regarding the extent to which Article 3 could apply to Article 7 (as currently formulated), the Cion agreed to explore the A proposal set out in fn 159.

\textsuperscript{71} ES suggested the replacement of "mail" by "means". In response to a question from FIN, the Cion confirmed that the existing formulation also covered mail received over mobile networks.

\textsuperscript{72} ES proposed to add "when the recipient has not stated his clear express opposition to receiving this type of communication", with a view to covering business-to-business communication. The Cion considered this to be already covered by the telecoms data protection directive (97/66/EC), but could agree to the addition of "where authorised".
Article 8\textsuperscript{73}

Regulated professions\textsuperscript{74}

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\textsuperscript{75} 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\textsuperscript{76} 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.\textsuperscript{78}

\textsuperscript{73} A, B, D, LUX and NL entered reserves and P a scrutiny reserve on this Article. A suggested its deletion.

\textsuperscript{74} F proposed modification of the title to read "Regulated activities", whilst UK expressed its wish to see a definition of "regulated professions".

\textsuperscript{75} A number of delegations considered that the text did not adequately distinguish commercial communication from the provision of services. The Cion undertook to reflect on the following proposal for reformulation suggested by the B delegation: "Member States shall provide in their legislation that the use of (F text "recours à") commercial communication is authorised to the extent necessary for the provision by regulated professions of Information Society services provided that ...".

\textsuperscript{76} I entered a reserve on paragraphs 2 and 3 of this article.

\textsuperscript{77} Certain delegations (A, ES I and NL) considered that the contents of this paragraph would be more suited to a recital. ES, supported by NL, suggested replacing "encourage" with "support and encourage the initiatives of".

\textsuperscript{78} Only F, P and UK could agree to a role for the Commission in this regard, and this would be subject to an agreement on the form of comitology. A majority of delegations favoured deletion of the paragraph, with IRL and S entering reserves.
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;\(^87\)

c) contracts\(^88\) governed by family law;\(^89\)

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.\(^91\)

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.\(^92\)

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\(^87\) A number of text proposals were made regarding this sub-paragraph:

- I: "contracts which may be registered with a public authority";
- ES: "contracts which in order to be valid or to have effects on third parties are required ...";
- A: "contracts which for inclusion in a register require official validation or an act of a notary";
- D: "contracts... public authority or other public organisation".

S, with support from FIN, suggested replacing this sub-paragraph with the following:

"contracts that create or transfer rights concerning real estate". ES also wished to see a specific reference to property rights.

\(^88\) ES proposed the addition of the words "or legal acts" after "contracts" in sub-paragraphs (c) and (d) to cover adoptions etc.

\(^89\) In response to a question from P, the Cion confirmed that marriage contracts, although not necessarily pre-nuptial agreements, would be outside the scope of the Directive.

\(^90\) Several proposals were made for new exemptions to be included in paragraph 2:

- P suggested "contracts which according to national law, require the physical presence of the persons involved."
- A and D wished to see a new sub-paragraph covering guarantees made in respect of loans.
- D, with some support from ES and FIN, wished to see employment contracts excluded.

\(^91\) A majority of delegations favoured the deletion of this paragraph. The Cion indicated that this would be acceptable subject to a satisfactory agreement on paragraph 2.

\(^92\) Following concerns expressed by the I delegation, A suggested the deletion of "the categories of contracts covered by". B, however, preferred to delete the paragraph entirely.
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.

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93 D entered a reserve and IRL a scrutiny reserve on this article.
94 In response to the concerns of several delegations, the Cion undertook to reformulate the text so as to clarify that it applied only to web-sites.
95 I, supported by ES and F, proposed the addition of "without prejudice to other information required by Community law".
96 In response to the concerns expressed by ES and UK, the Cion undertook to clarify the notion of "professional persons".
97 A and D proposed the addition of "technical" before "manner".
98 It was agreed to replace "unequivocally" with "unambiguously". ES also suggested the addition of "comprehensibly".
99 D proposed reformulating this sub-paragraph as follows: "the technical functions which have to be performed to convey and receive declarations by electronic means".
100 A number of drafting points were made regarding these sub-paragraphs:
    - in (b) "filed" should read "stored";
    - in (c) "expedients" should be replaced by "means" and "handling" by "input".
101 A, supported by NL, suggested adding "by the Information Society service provider". F, for its part, suggested a reformulation as follows: "the modalities for the filing of the contract and its accessibility".
102 D proposed the addition of "prior to transmitting the declaration".
103 F proposed adding "(d) the languages offered for the conclusion of the contract."
104 In response to concerns expressed by A and D, the Cion undertook to clarify, perhaps in a recital, that this paragraph only concerns technical aspects. FIN and NL considered that the contents of the paragraph might be better dealt with in either Article 11 (FIN) or Article 10(1) (NL).
3. Member States shall lay down in their legislation\textsuperscript{105} that, except when otherwise agreed by professional parties, the service providers shall indicate any\textsuperscript{106} codes of conduct to which they subscribe and information on how those codes can be consulted electronically.\textsuperscript{107}

\textit{Article 11\textsuperscript{108}}

\textit{Moment at which the contract is concluded}

1.\textsuperscript{109} 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\textsuperscript{110}, such as clicking on an icon\textsuperscript{111}, the following principles apply:

\begin{itemize}
  \item[(a)] the contract is concluded\textsuperscript{112} when the recipient of the service:
    \begin{itemize}
      \item has received from the service provider, electronically\textsuperscript{113}, an acknowledgment of receipt of the recipient’s acceptance, and
      \item has confirmed receipt of the acknowledgment of receipt;\textsuperscript{114}
    \end{itemize}
  \item[(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;
\end{itemize}

\textsuperscript{105} UK, supported by FIN and NL, proposed that the obligation on Member States should be merely one of encouragement to service providers.

\textsuperscript{106} A proposed the addition of "existing", whilst D suggested "relevant".

\textsuperscript{107} B suggested including this paragraph in Article 5, whilst D proposed the addition of a recital relating to the cost implications of this paragraph and Articles 5 and 6.

\textsuperscript{108} D entered a reserve and IRL a scrutiny reserve on this article, while A entered a reserve on paragraph 1. Certain delegations (D, DK and S) expressed doubts regarding the necessity of the article.

\textsuperscript{109} Differing views were expressed regarding this paragraph. IRL, UK and LUX were broadly content with the Cion proposal, while a further group of delegations (B, ES, F, GR, I and P) were in favour of a degree of harmonisation on this point. Other delegations (A, D, DK, FIN, NL, and S), however, were reluctant to intervene in areas of traditional contract law. In the light of the discussion the President invited the Cion to take contact with delegations and draw up a number of options.

\textsuperscript{110} UK suggested simplifying the text as follows: "... in cases where a recipient is required to accept a service provider's offer through technical means, ...". The Cion undertook to reformulate the paragraph so as to clarify that it applied principally to web-sites.

\textsuperscript{111} ES proposed the addition of "or mechanisms for electronic signature".

\textsuperscript{112} ES suggested adding "without prejudice to those rules governing its finalisation and implementation".

\textsuperscript{113} It was agreed to replace "electronically" with "by electronic means".

\textsuperscript{114} There was a broad agreement among delegations and the Cion to delete this indent.
(c) acknowledgment of receipt by the service provider and confirmation of the service recipient shall be sent as quickly as possible.\textsuperscript{115}

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.\textsuperscript{116}

Section 4\textsuperscript{117} Liability\textsuperscript{118} of intermediaries\textsuperscript{119}

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\textsuperscript{120} 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:

\begin{itemize}
    \item ES proposed an additional sentence reading: "Any delay exceeding that which is usual in this form of commerce shall generate a liability and an obligation to reimburse any damage incurred."
    \item It was agreed to reformulate the end of the sentence as follows: "...appropriate technical means allowing him to identify and rapidly to correct input errors." It was also agreed to add a reference specifying that such means be made available prior to finalisation of the contract. I, for its part, requested an addition granting the possibility for the recipient to be able to print the contract in permanent form.
    \item D, ES, E, FIN, IRL, NL and UK entered scrutiny reserves on the entirety of this section and I a reserve on Articles 12 and 13. Following earlier requests from a number of delegations, the Cion submitted a working paper providing technical details of the types of activities referred to in Articles 12 to 15 (see Working Doc. 4/99). A, FIN and NL proposed combining Articles 12 and 13, whilst the Cion, supported by D and UK, insisted on the need for separate articles. ES, with some support, wished to clarify in a recital that the Directive covered only questions of civil liability.
    \item F proposed the following definition of the term "intermediary": "any service provider who is involved in electronic communications, such as the one who gives access to the communication network or is in charge of transmitting, caching or hosting information conveyed via the communication network."
    \item FIN recalled its own similar proposal (see fn. 17), which was supported by NL.
    \item It was agreed to replace "the" with "a".
\end{itemize}
(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:

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121 I, supported by A, ES and NL, proposed inserting the following sub-paragraphs prior to (a):
"(x) 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
(y) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; or"

The Cion preferred to clarify in a recital that Article 12 would not cover cases where network operators collaborate with content providers.

122 In response to concerns raised by NL and UK, the Cion proposed the following addition: "... or modify the content of the information..."

123 UK considered the notion of "information provided by a recipient of the service" confusing, preferring a reference to "third party information".

124 It was agreed to refer to "service provider" in the introductory sentence and sub-paragraphs of Articles 13 and 14.
(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.

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125 I, supported by A and ES, proposed inserting the following sub-paragraphs prior to (a): 
"(x) 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
(y) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; or".

126 D wished to delete this sub-paragraph, whilst B, supported by LUX, suggested the addition "subject to what is laid down in (c)".

127 A and D suggested the addition of a reference to "rules of care" in (c) and (d), and, together with UK, had difficulties with the notion of "industrial standards".

128 A and D made proposals to address concerns regarding data protection (A: "legal technology"; D: "anonymised data").

129 Several delegations expressed concerns regarding the words "actual knowledge", see also fn. 132.

130 D proposed the following additions:
- at the end of (e) : "if the removal or the barring is technically feasible and can reasonably be expected." (support from FIN and UK)
- as Paragraph 2 : "Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider."
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.

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131 In response to the concerns of certain delegations (D, GR), the Cion agreed to reformulate this paragraph to clarify that it covered active as well as passive hosting.

132 A number of delegations had difficulty understanding the meaning of "actual knowledge". A suggested a reference to national law in a recital, whereas F preferred to add a new sub-paragraph (c) imposing an obligation on service providers to inform national authorities in cases of doubt.

133 In response to the concerns of A and UK, the Cion agreed to draft a recital clarifying that the term "activity" includes issues of illegal material.

134 B and D both proposed simplification of this sub-paragraph, with B suggesting deletion of "and, as regards ... apparent" and D the deletion of "does not have... damages".

135 ES and GR were concerned about the censorship implications of this sub-paragraph. ES suggested the following additions "... awareness, in accordance with national legislation, acts expeditiously to remove, where necessary, or to ...", whilst GR proposed that a notice from an appointed body be necessary before access is removed.

136 D proposed an addition on the technical feasibility of such action (see also fn. 130).
Article 15\(^{137}\)

No \(^{138}\) obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12 and 14\(^{139}\), to monitor the information which they transmit or store, nor a general obligation actively\(^{140}\) to seek facts or circumstances indicating illegal activity.\(^{141}\)

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.\(^{142}\)

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\(^{137}\) F wished to preserve the possibility of obliging hosting service providers to maintain client lists, whilst S, for its part, wanted to maintain a monitoring obligation on bulletin board providers (as regards child pornography and content inciting racial hatred).

\(^{138}\) It was agreed to add "general" before "monitoring."

\(^{139}\) It was agreed that a reference to Article 13 should be inserted.

\(^{140}\) LUX suggested the deletion of "actively".

\(^{141}\) D wished to add a sentence clarifying that specific monitoring operations are unaffected, whilst NL and ES suggested adding an obligation to provide "usual care".

\(^{142}\) A number of drafting proposals were made regarding this paragraph:
- deletion of "targeted, temporary" (A, ES, GR)
- deletion of "judicial" (A, GR, P and UK)
- replacement of "criminal offences" by "any type of offence" (A, ES, GR)
- deletion of the second part of the sentence "to safeguard ... criminal offences" (A)
- addition of a reference to "public health" (P).
CHAPTER III\textsuperscript{143}  
IMPLEMENTATION  

Article 16  

Codes of conduct  

1. Member States and the Commission shall encourage:  

\begin{itemize}
\item[(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;  
\item[(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;  
\item[(c)] the accessibility of these codes of conduct in the Community languages by electronic means;  
\item[(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.  
\end{itemize}  

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  

\textsuperscript{143} It should be noted that Chapters III and V, as well as Article 22(3), have not been subject to the same detailed examination as the rest of the proposal.
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.


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 dispute 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\(^{144}\)

Exclusions and derogations

1. This Directive shall not apply to:
   (a) taxation;\(^{145}\)
   (b) the field covered by Directive 95/46/EC of the European Parliament and of the Council;\(^{146}\)
   [(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.]\(^{147}\)

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:

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\(^{144}\) D, GR and P entered general reserves and A a scrutiny reserve on this Article. Some delegations considered that the content of Article 22(1) would follow more logically after Article 1.

\(^{145}\) ES and NL requested clarification of the scope of this exclusion, with ES proposing the following recital: "(7a): Whereas this Directive does not aim to establish specific rules on fiscal obligations; whereas this Directive may not affect the development of future directives or, should the case arise, any regulations through which Community law aims to regulate fiscal aspects of electronic commerce."

\(^{146}\) Certain delegations (NL and P in particular) questioned the need for this exclusion, while UK preferred the formula "without prejudice to Directive 95/46/EC". The Cion opposed deletion but reacted positively to a suggestion from B, supported by A, to add a reference to Directive 97/66/EC.

\(^{147}\) All delegations except GR opposed the Commission's power to amend the directive's scope and supported the incorporation of the contents of Annex I into Article 22(1).
(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.

(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;\(^ {148}\)
- the representation of a client and defence of his interests before the courts\(^ {149}\);
- gambling activities, excluding those carried out for commercial communication purposes.\(^ {150}\)
- \(^ {151}\)

\(^ {148}\) Several delegations had difficulties with this exclusion:
- ES proposed to add "as well as other activities related to official professions which involve the exercise of a legal public power of the state."
- B, FIN, NL and P considered that the exercise of public functions was the key criterion, which should be applicable to both notaries and similar professions. P proposed the following text: "Acts whose validity or effectiveness depends, according to national law, on the involvement of a notary or the creation of a register."

In the light of the discussions the Cion undertook to reformulate this indent.

\(^ {149}\) A and D wished to add "before official authorities and in other legal disputes".

\(^ {150}\) Several delegations (A, B, D, FIN, and UK) requested clarification that all forms of gambling where a stake is laid (including lotteries and betting) are covered by the text, irrespective of whether commercial communication is involved. The Cion agreed to submit a revised text.

\(^ {151}\) Diverse views were expressed on the desirability of further exclusions:
- I requested the exclusion of financial services, while F suggested that such services might be included in Annex II (derogations from Article 3);
- UK opposed special treatment for financial services but suggested an additional exemption worded as follows: "The provision of services for the confidentiality of information when they are covered by national provisions concerned with public policy or public security";
- F, supported by GR and the Cion, warned of the dangers of adding further exclusions.
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 and Directive 96/9/EC 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;

- Article 44 paragraph 2 of Directive 85/611/EEC;


- contractual obligations concerning consumer contracts;

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152 A, D and NL entered reserves and ES a scrutiny reserve on the contents of this Annex.

153 ES wished to see the second, third and fourth indents extended to include all financial services, and, together with F, expressed concern that this directive should not contradict the draft directive on distance selling of financial services.

154 NL queried the need for this indent, whilst A raised concerns regarding its formulation. Responding to a suggestion from the FIN delegation, the Cion considered the addition of a reference to the Investment Services directive to be unnecessary, given that this directive was in any case based on the country of establishment principle.

155 I, with support from A, DK and ES, proposed replacing "obligations" with "relations", so as to include pre-contractual measures. In response to a question from FIN regarding the meaning of Recital 19, the Cion confirmed that "obligations" was not intended to include the pre-contractual phase in any general sense. I suggested the inclusion of a specific reference to the consumer protection directives referred to in Recital 14.

156 UK suggested the addition of a definition of "consumer".

157 Several delegations (B, FIN, GR, NL, and S) considered that this indent could be deleted, subject to a reformulation of Article 3(3) along the lines suggested previously by the NL delegation (see fn 41). NL agreed to prepare a paper justifying its earlier proposal, whilst the Cion also undertook to provide a paper on the relationship between Community law and International Private Law.
unsolicited commercial communications by electronic mail, or by an equivalent individual communication.

A proposed the addition of the words "the permissability of unsolicited ..." so as to maintain the applicability of the country of origin principle to Article 7 of this directive (see fn 70). The Cion undertook to reflect on this proposal.

D proposed deleting "unsolicited", although the Cion warned that this would then exclude web-site advertising from the country of origin principle.

Certain delegations (D, ES and NL) questioned whether unsolicited commercial communication was an Information Society service according to Article 2(a) and hence whether a derogation was necessary. LUX, for its part, was concerned about the difficulty of identifying such communication.

The inclusion of a reference to Directive 92/28/EEC on the advertising of medicinal products, requested by UK, with support from A, F and P, was considered unnecessary by the Cion given that the sale of prescribed medicines over the Internet was already illegal in all Member States.
Additional Drafting Suggestions

1) Drafting suggestions from the Austrian delegation

Article 1(3)

This directive complements Community law applicable to Information Society services without prejudice to the existing level of protection, in particular of public health and consumer protection, which was established by different Community instruments and national statutory and administrative provisions corresponding to the same, including those adopted for the functioning of the Internal Market. In addition, this directive is without prejudice to other Community regulations to the extent they are applicable to Information Society services.

Article 2

For the purpose of this directive,

(a) "information society services" shall mean any service provided as a gainful activity, electronically, at a distance and at the individual request of a recipient of services and/or via inter-active networks, with the exception of telecommunication services within the meaning of Directive 97/51/EC of the European Parliament and the Council as well as broadcasting services within the meaning of Directive 98/84/EC of the European Parliament and the Council;

For the purpose of this definition,

- "service provided at a distance": a service which is made available without the parties being simultaneously present;
- "service provided by electronic means": a service which is sent initially and received at its destination by means of electronic equipment for the processing [(...)] and storage of data and which is entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- "service provided at the individual request of a recipient of services": a service which is made available through the transmission of data on individual request;
- "service provided via inter-active networks": a service the contents of which, which have been transmitted to the recipient of services, are substantially determined by the entries made by the recipient of the services;

(b) "service provider" shall mean any natural or legal person or any other legal entity making available an information society for commercial purposes;
"recipient of the service" shall mean any natural or legal person or any other legal entity who, for professional or other ends, uses an information society service [...];

"electronic commercial communication" shall mean any form of communication which, within the scope of information society services, are designed to promote, directly or indirectly, the sale of goods and services or the image of a business enterprise, any other organisation or a natural person pursuing a commercial industrial or craft activity or a profession.

The following do not as such constitute a form of commercial communications:

- information exclusively allowing direct access to the activity of the business enterprise, organisation or person, such as, in particular a domain name or an e-mail address;
- information relating to goods and services or the image of a business enterprise, an organisation or a person compiled by the same in an independent manner, in particular without financial consideration;

"coordinated field" [to be elaborated].

Article 3

3. This directive [is without prejudice to] does not affect the provisions of private international law relating to conflicts of law or jurisdiction.

ANNEX III

Indicative list of services not covered by the directive:

1. Services not provided at a distance;

   - Services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices
     
     (a) medical examinations or treatment at a doctor; surgery using electronic equipment where the patient is physically present;
     (b) consultation of an electronic catalogue in a shop with the customer on site;
     (c) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers;
     (d) electronic games made available in a video-arcade where the customer is physically present.

2. Services not provided by electronic means;

   - Services having material content even though provided via electronic devices:
     
     (a) automatic cash or ticket dispensing machines (banknotes, rail tickets);
     (b) access to road networks, car parks, etc, charging for use, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment is made,
- Off-line services: distribution of CD roms or software on diskettes,

- Services which are not provided via electronic processing/inventory systems:

(a) voice telephony services;
(b) telefax/telex services;
(c) services provided via voice telephony or fax;
(d) telephone/telefax consultation of a doctor;
(e) telephone/telefax consultation of a lawyer;
(f) telephone/telefax direct marketing.

3. Services not supplied at the individual request of a recipient of services;

- Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):

(a) television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC;
(b) radio broadcasting services;
(c) (televised) teletext.

4. (a) digital telephony (ISDN network, mobile telephone networks)
(b) voice mail boxes
(c) electronic answering machines
(d) telefax machines with data storage
(e) telefax with memory
(f) telefax on demand
(g) Internet telephony
(h) pay-TV
(i) pay-radio services
(j) Internet TV (to the extent the signals are not modified by the recipient of the services)
(k) Web-casting
(l) Internet radio
(m) (mere) video on demand (unless inter-active)
(n) video near on demand
(o) audio on demand
(p) music on demand
2) Drafting suggestions from the Commission's services

**Article 4**

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

*(whereas the Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not cover a postal service consisting of the physical delivery of a printed e-mail message)*

**Article 5**

1. Member States shall lay down in their legislation ensure that the service provider shall render easily, directly and permanently accessible, in a direct and permanent manner to their recipients of the service and competent authorities, the following information:
   
   (b) the physical address at which the service provider is established;
   
   [...] 
   
   (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, or equivalent means of identification, in that register;
   
   [...] 
   
   (g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Council Directive 77/388/EEC¹ as amended by the Council Directive 80/98/EC² VAT number under which he is registered with his fiscal administration.

2. Member States shall lay down in their legislation ensure that, where Information Society services refer to prices, these are to be indicated accurately clearly and unequivocally, unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

¹ OJ No L 145 13/06/77
² OJ No L 281 17/10/98
Article 6

Member States shall lay down in their legislation, ensure that commercial communication which is part of or constitutes an Information Society service shall comply with the following conditions:

[...]

(c) promotional offers, such as discounts, premiums and gifts, where authorised, in the Member State where 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, clearly and unequivocally.

(d) promotional competitions or games, where authorised in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented accurately, clearly and unequivocally.

(in addition a recital will clarify the distinction between the promotional competitions and games referred to in this article and gambling activities as referred to in Annex 1)

Article 7

Member States which authorise shall lay down in their legislation that unsolicited commercial communication by electronic mail, shall ensure that such commercial communication by a service provider established in their territory shall be identifiable as such as soon as it is received by the recipient.

Article 8

1. Member States shall lay down in their legislation relating to commercial communication is authorised in order to allow the provision of Information Society services 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, commercial communication 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, and in cooperation with professional associations and bodies, the information referred to in paragraph 2.
Regarding footnote 141 on page 23 the Greek delegation also suggested that greater clarity was needed regarding the nature of the monitoring operation referred to in Article 15(1).
At its meeting of 1 and 2 July 1999, the Working Party on Economic Questions (Information Society services) continued its second reading of the above-mentioned proposal with the examination of Articles 16 to 21.

The main comments on these provisions, together with the text of the Commission proposal, are contained in the attached Annex.
Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
on certain legal aspects of electronic commerce in the internal market

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;

1 D and I entered reserves on this article.
2 ES, supported by GR, proposed adding: "without prejudice to national and Community rules".
3 Several delegations were concerned about the implementation of this article. B and I preferred to replace "encourage" with "recognise the usefulness of codes", whilst NL and LUX suggested that the article be deleted and its contents included in a recital.
4 D considered that the text should be broadened so as to include industry bodies.
5 ES, with support from GR, suggested the addition of "voluntary" before "transmission". A and D expressed the view that the voluntary nature of (c) and (d) also be made clearer.
6 Several delegations (A, ES, GR and P) proposed deletion of "so that ... Community law", a suggestion which the Cion signalled its willingness to accept. LUX, for its part, preferred to replace "their compatibility" with "the compatibility of the principles contained in the codes".
(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 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

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7 UK, supported by a number of delegations, proposed, that paragraph 2 be reformulated to read: "Member States and the Commission shall encourage associations representing consumers, the visually impaired and disabled, and other interests, insofar as they may be concerned, to be involved in the drafting and implementation of codes of conduct...". D, NL and the Cion, however, expressed concern about singling out particular vulnerable groups. D, GR, I and UK proposed the deletion of "effective".

8 D proposed replacing paragraph 1 with the following: "Member States shall ensure that, in the event of a disagreement between an Information Society service provider and its recipient, their legislation does not hamper the use of existing out-of-court schemes for dispute settlement, including appropriate electronic means." B, NL, P and UK expressed support for this proposal; ES and IRL agreed on the approach but preferred to delete the word "existing"; ES proposed supplementing the proposal with a specific reference to consumer disputes and by adding "according to their national legislation" at the end of the sentence.

9 Six delegations (A, B, ES, I, NL and UK) preferred to delete this paragraph. IRL, for its part, wished to see the reference to "adversarial techniques" removed.
to transmit any other information on the practices, usages or customs relating to electronic commerce.\textsuperscript{11}

\textit{Article 18}\textsuperscript{12}

\textit{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.\textsuperscript{13}

2. Acts in breach of the national provisions incorporating Articles 5 to 15\textsuperscript{14} of this Directive which affect consumers' interests\textsuperscript{15} shall constitute infringements within the meaning of Article 1(2) of Directive 98/27/EC of the European Parliament and Council.\textsuperscript{16}

\textsuperscript{11} Seven delegations (A, B, D, ES, I, P and UK) supported the deletion of this paragraph.

\textsuperscript{12} D entered a reserve on this article.

\textsuperscript{13} A number of drafting suggestions were made in respect of this paragraph:
- D, ES, I and IRL proposed the deletion of the word “effective”;
- ES proposed adding “according to their national legislation” after “ensure that”;
- D suggested the deletion of “rapid”;
- ES and F proposed the addition of “where appropriate/when applicable” after “interim measures”;
- IRL suggested reformulating the paragraph as follows: “...court actions can be brought rapidly against Information Society services providers so as to allow the [...] adoption of [...] measures [...] to remedy any [...] infringements and to prevent...”.

\textsuperscript{14} A and FIN did not consider that all of the Articles 5 to 15 were relevant in this context. FIN also suggested reformulating this provision so that it modified the Annex of Directive 98/27/EC (copying the technique used in the proposed directive on distance selling of financial services).

\textsuperscript{15} It was agreed that the text should refer only to collective consumer interests.

\textsuperscript{16} ES considered that this paragraph would be better located in Article 21 (see fn. 30).
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.

The following reserves were entered on this article: A on the whole article; I on paragraphs 3 and 4; D on paragraphs 4 to 7; S and UK on paragraph 4; P on paragraph 6.

B and NL queried the necessity of paragraph 1. D, for its part, sought clarification on the relationship of paragraphs 1 and 2 with the court and dispute settlement procedures referred to in Articles 17 and 18.

ES, with some support from A, I, P and UK, suggested reformulating this sentence to read: "Member States shall establish the appropriate schemes of supervision...". ES suggested similarly deleting all references to "competent/national authorities" in paragraphs 2, 3, and 5.

In response to concerns expressed by P and UK, the Cion confirmed that Member States could nominate more than one contact person, and that for both paragraphs 2 and 4, there was no obligation to create new administrative structures.

In response to concerns expressed by certain delegations (IRL, LUX, NL), the Cion confirmed that authorities would only be obliged to disclose information where this is authorised or permitted under national law. A nevertheless preferred to delete this paragraph.
4. Member States shall establish, within their administration\textsuperscript{22}, contact points which shall be accessible electronically and from which recipients and service providers\textsuperscript{23} may:
   (a) obtain\textsuperscript{24} 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. \textsuperscript{25}

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. \textsuperscript{26}

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. \textsuperscript{27}

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).

\textsuperscript{22} UK proposed the deletion of "within their administration".
\textsuperscript{23} Certain delegations (A, FIN, and S in particular) preferred to limit the provision of information to consumers.
\textsuperscript{24} ES, I and P suggested the addition of "general information".
\textsuperscript{25} The Cion undertook to reformulate the text of sub-paragraphs (a) to (c) so as clearly to exclude case by case legal assistance. Nevertheless I, IRL and NL preferred to delete (c), whilst ES proposed that "receive assistance" be replaced by "obtain information".
\textsuperscript{26} In response to the concerns of a number of delegations, the Cion proposed to limit the application of this paragraph to significant decisions, whilst UK, for its part, suggested the replacement of "ensure" by "encourage". A, ES, I, and NL, nevertheless preferred to delete the paragraph in its entirety.
\textsuperscript{27} The Cion undertook to reformulate this paragraph so as to clarify that cooperation related only to technical matters. A, B, ES and I nevertheless preferred to delete this paragraph as well as paragraph 7.
**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.

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28 D entered a reserve on this article, whereas A, B, ES and I requested its deletion. The Cion was invited to prepare a paper on the relationship between this article and the IDA programmes.

29 D entered a reserve on this article.

30 ES proposed to amend the title to "Infringements and Sanctions" and create a second paragraph taken from Article 18(2) (see fn. 16).

31 A proposed to add "or legal remedies" after "sanctions" and to delete the second part of the sentence beginning "and shall take all measures...".

32 IRL queried the impact of this provision on the independence of the judiciary.

33 A, D, I and NL favoured the deletion of the final sentence of this article.
At its meeting of 15 July 1999, the Working Party on Economic Questions (Information Society services) completed its second reading of the above-mentioned proposal with the examination of Articles 22(3) to 27.*

The main comments on these provisions, together with the text of the Commission proposal, are contained in the attached Annex.

* For comments on other articles see also documents 8891/99 and 9812/99.
Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
on certain legal aspects of electronic commerce in the internal market

CHAPTER IV
EXCLUSIONS FROM SCOPE AND DEROGATIONS

Article 22¹

Exclusions and derogations

3.² By way of derogation from Article 3(2), and without prejudice to court action³, the competent authorities of Member States⁴ may take such measures⁵ restricting the freedom to provide an Information Society service as are consistent with Community law and with the following provisions:

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¹ On an issue closely related to this article, the Cion emphasised the importance of a broad definition of the "coordinated field". Delegations nevertheless maintained their earlier positions (see footnote 34 of doc. 8891/99).
² A suggested reformulating this paragraph by copying the approach used in the "TV without frontiers" Directive.
³ In response to concerns expressed by several delegations (A, D, ES and S in particular), the Cion undertook to clarify that the court decisions would not be subject to the procedural conditions laid down in 22(3)(b).
⁴ I, supported by A, proposed adding: "as referred to in Article 19". The Cion preferred to clarify this in recitals.
⁵ In response to concerns expressed by several delegations (B, DK, I, NL and S), the Cion confirmed that the term "measure" applied only to individual and specific cases, and not to general legal texts. B and NL nevertheless insisted that the relationship between this article and Directive 98/48/EC ("Transparency Directive") should be further clarified.
(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, \(^6\)
- 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\(^9\);

(c) Member States may lay down in their legislation\(^10\) 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

\(^6\) P felt that a clear distinction should be made between public policy and fundamental rights in this indent.

\(^7\) P proposed the addition of further indents to cover "the advertisement of pharmaceutical products" and, together with D, "the protection of ones reputation/honour".

\(^8\) S, supported by DK, wished to clarify in the text the continued application of Directive 98/27/EC ("Injunction Directive"). The Cion, however, preferred to do this by adding a reference in Recital 14.

\(^9\) In response to the concerns of F, the Cion undertook to clarify in the text that the two indents could be carried out simultaneously. A proposed that there be no duty to notify the Member State in the second indent, whilst I preferred to delete this indent entirely.

\(^10\) It was agreed to replace "may lay down in their legislation" by "shall ensure".
which the service provider is established, indicating the reasons for which the Member State considers that there is urgency.\textsuperscript{11}

(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.\textsuperscript{12}

CHAPTER V
ADVISORY COMMITTEE AND FINAL PROVISIONS

Article 23\textsuperscript{13}

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.

\textsuperscript{11} A proposed that the measures be notified only to the Commission and that references to the timescale and reasons for urgency be deleted.

\textsuperscript{12} A large number of delegations (A, D, ES, I, NL, P and S in particular) preferred to delete (d).

\textsuperscript{13} The Group postponed discussion on this article pending the availability of the new comitology decision.
Article 24

Re-examination

Not later than three years after the adoption of this Directive, and thereafter every two years \(^{14}\), 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\(^{15}\)

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.

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\(^{14}\) I considered that two years was too short a period.

\(^{15}\) Most delegations considered a one year implementation period too short.
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
COUNCIL OF THE EUROPEAN UNION

Brussels, 30 August 1999

Interinstitutional File:
98/0325 (COD)

COVER NOTE
from: Mr Carlo TROJAN, Secretary-General of the European Commission
date of receipt: 18 August 1999
to: Mr Jürgen TRUMPF, Secretary-General of the Council of the European Union
Subject: Amended proposal for a Directive of the European Parliament and of the Council on certain legal aspects of electronic commerce in the Internal Market

Delegations will find attached Commission document COM(99) 427 final 98/0325 (COD).

Encl.: COM(99) 427 final 98/0325 (COD)
OPINION OF THE LEGAL SERVICE

Subject: Legal analysis of the proposal for a Directive of the European Parliament and of the Council on certain legal aspects of electronic commerce in the internal market

5123/99 ECO 2 CODEC 6

INTRODUCTION

1. The Working Party on Economic Questions (Information Society services) requested the written opinion of the Council Legal Service on the following issues regarding the aforementioned proposal:

   – legal basis;
   – other legal issues:
     = mutual recognition and minimal harmonisation
     = implementing powers granted to the Commission
     = relationship between the proposal and the provisions of private international law

This note attempts to answer the Working Party’s request.
PART I

LEGAL BASIS OF THE PROPOSAL

2. The Council Legal Service would point out that the Court of Justice has consistently held that "the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure." ¹

The Court has also ruled that a double or multiple legal basis is only justified if the measure in question comprises several distinct elements which cannot be considered accessory to one another ².

Consequently, in order to address the issue of the choice of legal basis, it is appropriate to identify the purpose of the proposal (aim and content).

A. Purpose of the proposal

3. As regards the aim, the proposal seeks to "ensure the proper functioning of the internal market" and particularly "the free movement of Information Society services" (Article 1(1) of the proposal).

To this end, it removes the legal obstacles (resulting from existing disparities both in national regulations and in the case-law of the Member States) to the supply of Information Society services. Thus it:

(i) "approximates" ³ national provisions on Information Society services relating to the following:
   – establishment of service providers,
   – commercial communications,
   – on-line conclusion of contracts,
   – liability of intermediaries,
   – implementation of regulations (codes of conduct, out-of-court dispute settlements, court actions, and cooperation between Member States);

(ii) establishes the principle of "mutual recognition" of national regulations within the "coordinated field" ⁴. The coordinated field includes "the requirements applicable to Information Society service providers and Information Society services" (Article 2(f) of the proposal);

(iii) "complements" Community law applicable to Information Society services ⁵.

³ Article 1(2) of the proposal.
⁴ Article 3(2) of the proposal, together with Article 2(f) thereof.
⁵ Article 1(3) of the proposal.
4. As regards the **content**, the proposal provides in particular for the following:

(a) in **Chapter I** (general provisions):

   - maintaining the *acquis communautaire* as regards Information Society services (Article 1(3)),
   - the obligation on Member States to ensure that operators established on their territory comply with all national provisions applicable to electronic commerce (Article 3(1)) \(^6\),
   - the prohibition on Member States taking measures restricting the freedom to provide services \(^7\) except in the cases explicitly laid down \(^8\) (Article 3(2));

(b) in **Chapter II** (principles):

   under **Section 1** (establishment and information requirements):

   - the prohibition on Member States imposing on an operator wishing to open an Internet site any requirements specific to Information Society services (Article 4(1)),
   - the list of general information which must be accessible to users of an information service as well as to the competent authorities (Article 5);

   under **Section 2** (commercial communications):

   - the requirement for transparency in commercial communications (Article 6);
   - the obligation to provide a specific indication on the envelope of unsolicited commercial communications ("spamming" practices) (Article 7);
   - the general principle authorising commercial communication by regulated professions provided that the professional rules applicable to them are met (Article 8(1));
   - the Commission’s implementing powers for stipulating which information may be given for the purposes of providing the services of a regulated profession (Article 8(3));

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\(^6\) In order to delimit the types of provisions which Member States must ensure are respected by operators established in their territory, the proposal refers to the concept of "coordinated field". In the opinion of the Council Legal Service, the coordinated field includes the direct application of Article 49 EC (former Article 59) (principle of the freedom to provide services), as interpreted by the case-law of the Court, as well as existing Community instruments applicable to electronic commerce (for instance, those concerning consumer protection, Directives 93/13/EEC (unfair terms) (OJ L 95 of 1993, p. 29), 97/7/CE (distance contracts) (OJ L 144 of 1997, p. 19), 98/6/EC (indication of prices) (OJ L 80 of 1998, p. 27) and 98/27/EC (actions for an injunction) (OJ L 166 of 1998, p. 51)).

\(^7\) In order to delimit the types of measures that Member States may not take, the proposal refers to the concept of "coordinated field" (see note (6) above).

\(^8\) Article 22(2) and (3) and Annex II to the proposal.
under **Section 3** (Electronic contracts)

- the obligation on Member States to ensure that their legislation allows, "*in law and in practice*" ⁹, contracts to be concluded electronically, except in the cases set out in the proposal (Article 9) ¹⁰;
- the requirement for transparency in electronic contracts (Article 10);
- the moment at which an electronic contract is concluded, provided that the parties’ freedom of contract is respected (Article 11);

under **Section 4** (liability of intermediaries);

- limits to the liability, both civil and criminal, of Information Society service providers as regards the transmission and storage of information belonging to third parties (Articles 12 to 15);

(c) in **Chapter III** (implementation):

- encouraging the setting up at Community level of codes of conduct for the regulated profession of electronic commerce (Article 16);
- the obligation on Member States to ensure that their legislation allows the effective use of out-of-court schemes for dispute settlement (arbitration, mediation, conciliation, etc.) ¹¹ (Article 17);
- the obligation on Member States to ensure that their legislation allows for rapid court actions (such as interim measures) adapted to an on-line environment (Article 18(1)).
- application of Directive 98/27/EC (actions for injunctions) ¹² to cases of infringement of the Electronic Commerce Directive (Article 18(2)).
- obligation on Member States to ensure that their competent authorities have the appropriate powers of supervision and investigation necessary to implement the Electronic Commerce Directive effectively and cooperate with the competent authorities of the other Member States (Article 19(1) and (2));

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⁹ Recital 13.

¹⁰ This obligation concerns in particular the adaptation of formal requirements which cannot be fulfilled electronically and which would thus prevent the validity of a contract of this type. This does not concern the requirement of a signature, which is dealt with in the proposal for a Directive of the European Parliament and of the Council on electronic signatures.

¹¹ This obligation concerns in particular the adaptation of formal requirements which cannot be fulfilled electronically (for instance, the requirement for the parties to be physically present for the judgement or the hearing of the parties, the obligation for the judgement to be on paper, etc.) and which would thus prevent the on-line use of out-of-court schemes between Member States.

¹² Directive based on Article 100a of the EC Treaty.
(d) in Chapter IV (exclusions from scope and derogations):

- derogations from the scope of the proposal, derogations from the country of origin principle, and derogations from the freedom to provide services in specific cases (Article 22);
- implementing powers granted to the Commission 13 (Article 8(3), Article 9(3) and Article 20);

(e) in Chapter V (advisory committee): setting up an advisory committee responsible for assisting the Commission in exercising the implementing powers granted to it (Article 23).

5. In the light of its aim and content, we may conclude that the purpose of the proposal is the establishment a Community regulatory legal framework for certain specific aspects of electronic commerce in the internal market.

6. The question arises as to whether, given the aforementioned purpose, the proposal can be validly based, as proposed by the Commission, on Article 47(2) EC (former Article 57(2) of the EC Treaty) and on Article 55 EC (former Article 66 of the EC Treaty), regarding the freedom to provide services, and on Article 95 EC (former Article 100a of the EC Treaty), regarding the establishment and functioning of the internal market 14.

B. Community competence

7. The Council Legal Service believes that some of the provisions in the proposal clearly fall within Community competence as regards the freedom to provide services and the approximation of the laws, regulations and administrative provisions of the Member States regarding the functioning of the internal market.

13 Under these powers, the Commission would be entitled to:
- stipulate the types of information that can be given for the purposes of providing the services of a regulated profession (Article 8(3));
- amend the list of contracts for which Member States may exclude the use of electronic means (Article 9(3));
- lay down the rules governing cooperation between national authorities (Article 19(6));
- take measures to ensure the proper functioning of electronic media between Member States (Article 20);
- amend the list of activities of Information Society services which are excluded from the scope of the Directive (Article 22(1)(c)).

Thus, Articles 1 and 22 (scope of the proposal), Article 2 (definitions), Article 3 (internal market), Article 4 (principle excluding prior authorisation), Articles 5, 6 and 10 (information to be provided), Article 7 (unsolicited commercial communication), Article 8 (regulated professions), Article 11 (moment at which an electronic contract is concluded), Article 16 (codes of conduct), Article 19 (cooperation between authorities), Article 20 (electronic media) and Article 21 (sanctions) are provisions that directly affect the operation of the internal market as regards the free provision of services.

8. On the other hand, the proposal includes provisions (Articles 9, 10 and 11 (electronic contracts), Articles 12 to 15 (liability) and Articles 17 and 18 (court actions)) which do not directly concern the operation of the internal market as regards the freedom to provide services.

The question then arises as to whether the Community is competent to adopt the aforementioned Articles, and if so, whether these articles are of a purely accessory nature or whether they require a specific legal basis.

In order to answer the question, it is appropriate to analyse those articles.

9. First of all, Articles 9, 10 and 11 of the proposal set out the obligation on Member States to ensure that their national regulations make it possible to conclude electronic contracts (except for contracts expressly excluded from the proposal 15). In order to fulfil this obligation, Member States must examine whether their national legal framework contains any requirements that may cause problems, and, if so, modify any national provisions which prevent the conclusion of electronic contracts.

However, the purpose of Article 9 is not to draw up new legislation for electronic contracts, but to enable such contracts to be concluded.

Article 9 would seem necessary for implementing the free provision of Information Society services. Electronic contracts substantially facilitate electronic commerce without frontiers.

Indeed, Information Society services involving the sale of goods or services, and those involving access to information after the acceptance of certain contractual clauses, may require contractual transactions 16 to be carried out, and it must be possible for these to take the form of electronic contracts.

15 Article 9(2).
16 These clauses may cover intellectual property and data protection among others.
The Council Legal Service would point out that the Community has already adopted provisions regarding questions of contract law. These include in particular the provisions in Directives 90/314/EEC (package travel)\(^{17}\), 93/13/EEC (unfair terms)\(^{18}\) and 97/7/EC (distance selling)\(^{19}\). All these measures were based on Article 100a of the EC Treaty (which, after amendment, became Article 95 EC) on the grounds that they approximate national regulations in order to prevent distortions of competition.

The contract law contents of Articles 9, 10 and 11 of the proposal are analogous to those set out in the aforementioned Directives.

Consequently, the Council Legal Service believes that the Community may adopt provisions such as those in Articles 9, 10 and 11 of the proposal on the basis of Article 95 EC (former Article 100a of the EC Treaty).

10. **Articles 12 to 15** of the proposal harmonise at Community level the national provisions of Member States regarding *limitation of liability* (civil as well as criminal) of on-line service providers when they act as intermediaries\(^{20}\), for specific and limited activities (for instance, copyright piracy, unfair competition, misleading advertising).

The purpose of Articles 12 to 15 is to ensure that diverging national provisions and case-law on limitation of liability do not prevent economic operators in Member States from enjoying the freedoms guaranteed by Community law and do not produce distortions of competition in the internal market. In view of the fact that that the legal systems of Member States do not distinguish in the same way between actions which may carry civil liability and those which may carry criminal liability\(^{21}\), the proposal contains rules regarding the limitation of liability in both civil and criminal proceedings. These rules do not preclude Member States from determining which elements may or may not constitute a criminal offence.

It should be pointed out that, according to decisions of the Court:

"*the effectiveness of Community law cannot vary according to the various branches of national law which it may affect*" \(^{22}\) and

"*although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law*" \(^{23}\).

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\(^{17}\) Directive based on Article 100a of the EC Treaty (OJ L 158 of 1990, p. 59)

\(^{18}\) Directive based on Article 100a of the EC Treaty (OJ L 95 of 1993, p. 29)

\(^{19}\) Directive based on Article 100a of the EC Treaty (OJ L 144 of 1997, p. 19)

\(^{20}\) Activities of mere conduit, caching and hosting.

\(^{21}\) Certain offences (such as libel) may fall under civil or criminal law depending on the legal system of the Member State.

\(^{22}\) See Judgement of 1 July 1993, Hubbard and Hamburger, C-20/92, ECR 1993, p. 3790, point 19.

\(^{23}\) Judgement of 1 January 1999, Calfa, C-348/96, point 17 (not yet published).
The Council Legal Service points out that the Community has already laid down provisions regarding liability (civil and criminal). These include Article 9 of Directive 91/308/EEC (prevention of the use of the financial system for the purpose of money laundering) 24. This Article provides for an absolute exemption from liability ("liability of any kind") for employees or directors of financial institutions and for specific actions.

Consequently, the Council Legal Service believes that, following the example of the limitations set out in Directive 91/308/EEC, the Community may lay down provisions such as those in Articles 12 to 15 of the proposal on the basis of Article 95 EC (former Article 100a of the EC Treaty).

11. **Articles 17 and 18** of the proposal aim to facilitate the existence in Member States of a number of different means of settling disputes over an Information Society service.

Article 17 on out-of-court dispute settlement requires Member States to ensure that their legislation does not prevent the use of out-of-court schemes for dispute settlement, "including appropriate electronic means", whilst abiding by the principles of independence and transparency, of adversarial techniques, procedural efficacy, legality of the decision, and freedom of the parties and of representation.

Article 18 on court action procedures requires Member States to "ensure that effective court actions can be brought against Information Society services’ activities".

Consequently, Articles 17 and 18 do not seek to establish common implementing rules in all Member States or to harmonise judicial or out-of-court proceedings as such. Nor do they require Member States to set up new procedures at Community level, but rather to adjust their national provisions in order to allow the effective implementation of the freedom to provide Information Society services.

The Court has acknowledged 25 that "a national procedural rule ... is liable to affect the economic activity of traders from other Member States on the market of the State in question. Although it is, as such, not intended to regulate an activity of a commercial nature, it has the effect of placing such traders in a less advantageous position than nationals of that State as regards access to its courts. Since Community law guarantees such traders free movement of goods and services in the common market, it is a corollary of those freedoms that they must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State."

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24 Directive based on Article 57(2) and on Article 100a of the EC Treaty (OJ L 166 of 1991, p. 77).
The Council Legal Service points out that the Community has, on several occasions, laid down provisions concerning civil procedure, on the basis of Article 95 EC (former Article 100a of the EC Treaty).

For instance:

- Articles 1 and 2 of Directive 89/665/EEC (application of review procedures to the award of public procurement contracts) require national authorities to ensure that effective and fast review procedures are available for cases of breach of Community legislation in public procurements. Member States must in particular "ensure" that they provide powers to "take, at the earliest opportunity and by way of interlocutory procedures, interim measures...", to "either set aside or ensure the setting aside of decisions taken unlawfully", and to "award damages to persons harmed by an infringement";

- Article 11 of Directive 97/7/EC (distance contracts) requires Member States to "ensure" that "adequate and effective" judicial or administrative means exist within national legislation "to ensure compliance with the Directive in the interests of consumers";

- Articles 1 and 2 of Directive 98/27/EC (actions for an injunction) seek to approximate the legal provisions of Member States relating to actions for an injunction (particularly those seeking "an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement").

The Council Legal Service believes that setting up the effective and rapid means for settling disputes between Information Society service providers and recipients laid down in Articles 17 and 18 of the proposal constitutes a corollary to the freedom to provide services and ensures the proper functioning of the internal market. Consequently, these provisions may be adopted on the basis of Article 95 EC (former Article 100a of the EC Treaty).

12. On the basis of the above analysis, the Council Legal Service believes that:

- Article 47(2) EC (former Article 57(2) of the EC Treaty) and Article 55 EC (former Article 66 EC), regarding the implementation of the freedom to provide services, as well as Article 95 EC (former Article 100a of the EC Treaty), regarding the establishment and functioning of the internal market, constitute the appropriate legal basis for Articles 1, 2, 3, 4, 5, 6, 7, 8, 16, 19, 20, 21 and 22 of the proposal;

- Article 95 EC (former Article 100a of the EC Treaty), regarding the establishment and functioning of the internal market, constitutes the appropriate legal basis for Articles 9, 10, 11, 12 to 15, 17 and 18 of the proposal.

*       *

PART II

OTHER LEGAL ISSUES

In addition to the question of the legal basis, the opinion of the Council Legal Service was sought on other issues regarding the following matters:

C. Mutual recognition and minimal harmonisation

13. The proposal states in Article 1(3) that it seeks to "complement 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."

The Council Legal Service believes that the wording of Article 1(3) should be clarified, since at the moment it comprises two distinct elements, namely:

- the proposal complements "Community law applicable to Information Society services";
- the proposal does not affect the level of protection for public health and consumer interests, as established by existing Directives, including those adopted on the basis of Article 100a of the EC Treaty.

14. As regards the first element, clarification is needed of which acts are covered by the concept of "law applicable to Information Society services". Does this refer to Community law, national law, or both?

If we recall the list of acts representing the acquis communautaire for Information Society services 29, given in recital 14 of the proposal’s preamble, we note that these are acts giving Member States the possibility of maintaining or adopting, with due regard to the Treaty, stricter national provisions (minimal harmonisation). It is therefore appropriate to specify, in the enacting terms of the proposal, whether the concept of "law applicable to Information Society services" also includes the aforementioned stricter national provisions.

29 These are the following Directives:

84/450/EEC  (misleading advertising) (based on Article 100 of the EC Treaty)
87/102/EEC  (consumer credit) (based on Article 100 of the EC Treaty)
90/314/EEC  (package travel) (based on Article 100a of the EC Treaty)
93/13/EEC  (unfair terms) (based on Article 100a of the EC Treaty)
97/7/EC  (distance contracts) (based on Article 100a of the EC Treaty)
97/66/EC  (processing of personal data in the telecommunications sector) (based on Article 100a of the EC Treaty)
98/6/EC  (indication of the prices of products offered to consumers) (based on Article 129a(2) of the EC Treaty)
98/43 EC  (advertising of tobacco products) (based on Article 57(2), Article 66 and Article 100a of the EC Treaty).
15. It would also be appropriate to clarify whether, for the purposes of the proposal, the concepts of "law applicable to Information Society services" 30 and of "coordinated field" 31 have the same scope (as would appear to be the case) or whether they refer to different elements. Furthermore, it would be appropriate to establish whether the expression "this Directive’s coordinated field" used in Article 3(1) and (2) implies a restriction of the concept of "coordinated field" defined under Article 2(f) and refers solely to the requirements applicable to Information Society service providers and their services under the proposal.

16. Finally, it would be appropriate to clarify the meaning of the verb "complements" which links the proposal to the "law applicable to Information Society services". This verb would appear to indicate that there is no hierarchy of norms between the proposal and the law applicable to information services, nor any "special law/general law" relationship, given that the proposal and the law applicable to Information Society services govern different issues.

If this is the meaning, it would be wise to rephrase Article 1(3), to specify that the proposal complements, although it does not affect, Community law applicable to information services and the existing level of protection for public health and consumer interests, as established by Community acts.

17. Article 3(1) stipulates that the country of origin controls the operators established in its territory. This control concerns "national provisions applicable in the Member State in question which fall within this Directive’s coordinated field". Consequently, it is the law of the country of origin that applies to the Information Society services supplied by a provider 32. Other Member States must refrain from any control.

Article 3(2) establishes the principle of mutual recognition of national regulations in the field of electronic commerce 33.

The Council Legal Service notes that the country of origin principle is not a principle laid down in the Treaty. The Court has held that the Community legislator may establish the country of origin principle or depart from it 34.

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30 Article 1(3) of the proposal.
31 Article 2(f) and Article 3(1) and (2) of the proposal.
32 This principle is compatible with the freedom of choice of applicable law, set out in Article 3 of the 1980 Rome Convention on the Law applicable to Contractual Obligations.
33 The paragraph follows Article 2a of Directive 89/552/EEC (television without frontiers), as amended by Article 1(3) of Directive 97/36/EC, and provides that "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".
If this principle is included in the proposal, it means that the host Member State cannot prohibit Information Society services provided by another Member State by invoking the exceptions to free movement of services referred to Articles 45 and 46 EC. According to the Court's case law, these exceptions are applicable only in the absence of Community rules, or a system of equivalence 35.

Since the proposal encompasses "a minimum" of Community harmonisation rules (Articles 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14) and the principle of the mutual recognition of national rules (Article 3(2)), once the Directive is adopted, the host Member State will be entitled to prohibit Information Society services provided by the Member State of origin only by virtue of the derogations from the principle of free movement referred to in Article 22(2).

18. It should also be noted that the proposal does not contain any minimum harmonisation clause authorising Member States to apply more stringent national measures than those imposed by the Directive provided such measures do not restrict free movement of Information Society services provided by another Member State 36.

Such a clause appears in the Directives referred to Article 1(3) of the proposal 37.

The Council Legal Service considers that, in the absence of a minimum harmonisation clause in the proposal, Member States may maintain or establish more stringent national provisions solely under Article 95(4) and (5) EC (former Article 100a (4) of the EC Treaty).

If it were intended to allow Member States to apply more stringent national provisions in cases other than those provided for in the Treaty, a provision to that end would have to be included in the proposal 38.

36 This means in practice that a Member State may apply more stringent rules to operators established in its territory, but cannot apply them to operators in other Member States, if this leads to restrictions on the free movement of information services.
38 This provision could read as follows: "Member States may lay down, with due regard for Community law, more stringent conditions than those established in this Directive".
D. **Implementing powers conferred on the Commission**

19. Under the proposal the Commission will be empowered to:

(a) stipulate the information that can be given when a regulated profession provides services (Article 8(3));
(b) amend the list of contracts in respect of which Member States may rule out the use of electronic media (Article 9(3));
(c) lay down the rules governing cooperation between national authorities (Article 19(6));
(d) take measures to ensure the proper functioning of electronic media between Member States (Article 20);
(e) amend the list of activities of Information Society services, excluded from the scope of the Directive (Article 22(1)(c)).

The question then arises of whether all the abovementioned powers are likely to be conferred on the Commission.

It should be pointed out that the Council can confer on the Commission only powers concerning management measures or measures to implement rules which it draws up. In the Court's view, the concept of implementation "comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application" 39.

There may be delegation by the Council to the Commission only as long as such delegation does not interfere with the institutional balance 40. The delegation must be sufficiently precise inasmuch as it must clearly indicate the limits of the powers delegated 41.

20. In view of the foregoing, the Council Legal Service considers that the provisions concerning the Commission's powers of implementation, contained in Articles 8, 19 and 20 of the proposal, are compatible with Article 202 EC (former Article 145 of the EC Treaty) since they concern implementation of the proposal.

On the other hand, the Council Legal Service notes that provisions contained in Articles 9 and 22 empower the Commission to take decisions 42 which go beyond the implementation framework and come instead under the legislative powers conferred by the Treaty. It therefore considers that the delegation of powers to the Commission regarding these provisions should be deleted.

42 – Decisions drawing up the list of contracts excluded from the scope of Article 9(1) of the proposal, and
– Decisions drawing up the list of activities excluded from the scope of the proposal (Article 22(1)(c)).
E. **Relationship between the proposal and rules of private international law**

21. In recital 7 of its preamble the proposal contains a rule of interpretation stating that private international law takes precedence over the Directive.

The Council Legal Service notes that this does not seem quite correct since a recital cannot affect the principle of the primacy of Community law. Furthermore, Article 3(1) of the proposal itself contains a rule of private international law, viz. the country of origin rule.

It therefore suggests that recital 7 in the preamble to the proposal be deleted.

**CONCLUSIONS**

In the view of the Council Legal Service:

- the proposal is correctly based on Article 47(2) EC (former Article 57(2) of the EC Treaty), Article 55 EC (former Article 66 of the EC Treaty) and Article 95 EC (former Article 100a of the EC Treaty);

- the wording of Article 1(3), Article 2(f), Article 3(1) and (2) of the proposal should be revised in order to ensure in particular consistency of the terminology used;

- in the absence of a minimum harmonisation clause in the proposal, Member States may maintain or draw up more stringent national rules only under Article 95(4) and (5) EC (former Article 100a(4) of the EC Treaty);

- the provisions concerning the Commission's powers of implementation contained in Articles 9 and 22 of the proposal go beyond the implementation framework and are not compatible with Article 202 EC (former Article 145 of the EC Treaty);

- recital 7 of the preamble to the proposal should be deleted.

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43 *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.*

44 The country of origin rule is compatible with the principle laid down in Article 4 of the 1980 Rome Convention on the law applicable to contractual obligations, which establishes freedom of choice of the law applicable.
The text of the above-mentioned draft Directive resulting from the meeting of the Working Party on 29 October 1999, together with footnotes indicating the positions of delegations and the Commission, can be found in the Annex.

It should be noted that new proposals from the Presidency, with a view to meeting the concerns of delegations, are highlighted in bold.
Draft
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on certain legal aspects of Information Society services,
in particular electronic commerce, in the Internal Market.
"Directive on electronic commerce"

CHAPTER I
GENERAL PROVISIONS

Article 1
Objective and scope

1. This Directive seeks to contribute to the proper functioning of the Internal Market by ensuring 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, 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.

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1 Additional recital in response to concerns expressed by S, who nevertheless maintain a reserve on the article:
"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;".

2 A entered a reserve on this paragraph. I, for its part, queried the legal basis in relation to "court actions".
3. This Directive complements Community law applicable to Information Society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts, including those adopted for the functioning of the Internal Market.

4. This Directive shall not apply to:
   (a) the field of taxation,

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3 A, DK, I, NL and S considered that the text should be broadened to include all national legislation consistent with Community acts. D, meanwhile, considered it important for the paragraph to clarify the cumulative nature of this directive with other Community instruments.

4 F proposed the addition of the following new paragraph: "This Directive is without prejudice to Community and national policies in the cultural field."

5 In response to the concerns of ES and LUX the following recital was proposed by the Presidency: "Whereas this Directive does not aim to establish rules on fiscal obligations; whereas this Directive does not pre-empt the elaboration of future Community instruments concerning fiscal aspects of electronic commerce;".

6 Text and following recital agreed by the Group (subject to scrutiny reserves entered by B, F and P): "Whereas the protection of individuals with regard to the processing of personal data is solely governed by European Parliament and Council Directives 95/46/EC and 97/66/EC which are fully applicable to Information Society services; whereas these Directives already establish a 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 personal data between Member States; whereas the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; whereas this Directive cannot prevent the anonymous use of open networks such as the Internet;".
(c) the following activities of Information Society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority;
- the representation of a client and defence of his interests before the courts;
- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

7 F maintained its reserve regarding the deletion of the Commission's powers to amend the content of paragraph 4 (c), although this is subject to an acceptable form of Comitology.
8 Reserves were entered by A and D on this indent.
9 A and D wished to add "..., before official authorities and in other legal disputes".
10 New text and recital in response to concerns expressed by several delegations:

"Whereas the exclusion of gambling activities from the scope of application of this directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; whereas this does not cover promotional competitions where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services;".

Certain delegations (B, GR, LUX and IRL) and the Cion proposed that this indent be transferred to Annex I, whereas I, for its part, proposed that promotional competitions be included in Annex I (see fn 94).

11 Diverse views were expressed on the desirability of further exclusions:
- I requested the exclusion of financial services;
- A and NL proposed an exemption covering the sale/advertisement of pharmaceuticals, whilst D proposed that this should at least be excluded from Art 3.
- A also proposed exemptions for medical services and for confidentiality services;
- F and GR supported by the Cion warned of the dangers of adding further exclusions.
For the purpose of this Directive, the following terms shall bear the following meanings:


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

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12 New recital: "Whereas the definition of Information Society services already exists in Community law in the European Parliament and Council Directive 98/48/EC and in the European Parliament and Council Directive 98/84/EC; whereas this definition covers any service normally provided for remuneration, at a distance, 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 98/48 which do not imply data processing and storage are not covered by this definition;".

13 In response to the concerns of A and D the Presidency has reformulated Recital (3) as follows:

"Whereas Information Society services span a wide range of economic activities which take place on-line; whereas these activities can, in particular, consist of selling goods on-line; whereas activities such as the delivery of goods as such or the provision of services off-line are not covered; whereas Information Society services 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 services consisting of the transmission of 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 Directive 89/552 and radio broadcasting are not Information Society services because they are not provided at individual request; whereas by contrast services which are transmitted point to point, such as video on demand or [...] commercial communications by e-mail are Information Society services; whereas the use of e-mail by natural persons acting outside their trade, business or profession is not an Information Society service."

A and D maintained their request for an updated indicative list similar to that found in Annex V of the "Transparency Directive".

14 A requested the insertion of a recital to clarify that the wording of (b) and (d) covers all forms of legal entity.
(c) "established service provider": a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, 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) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;

Recital (9) amended to read: "Whereas the place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; whereas this requirement is also fulfilled where a company is constituted for a given period; 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 but the place where it pursues its economic activity; whereas in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; whereas in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the center of his activities relating to this particular service; whereas in cases where it is particularly difficult to assess in which Member State 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;".

UK proposed the deletion of the fourth and sixth "whereas" clauses in this recital, and of the corresponding definition, preferring to treat this issue in Article 3.

ES proposed the addition of "according to the legislation of each Member State".

F, I and P requested the addition of a definition of "intermediary".

A and D prefer the term "user".

A, D and NL proposed the deletion of "in particular ... accessible".
(f) "commercial communication": 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 in themselves 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, particularly when this is without financial consideration.


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20 New definition in response to the concerns of UK.
(g) "coordinated field": requirements laid down in Member States' legal systems applicable to Information Society service providers or Information Society services, regardless of whether they are of a general nature or specifically designed for them.

- The co-ordinated field concerns requirements with which the service provider has to comply in respect of:
  . the taking up of the activity of an Information Society service, such as requirements concerning qualifications, authorisation or notification schemes;
  . the pursuit of the activity of an Information Society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.
- The co-ordinated field does not cover requirements such as:
  . requirements applicable to goods as such,
  . requirements applicable to the delivery of goods,
  . requirements applicable to services not provided by electronic means;
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 the coordinated field.

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

3. Paragraphs 1 and 2 do not affect:
   - the designation of competent courts,
   - the choice of the law applicable to their contract by the parties concerned,
   - the law applicable to contractual obligations concerning consumer contracts.

Discussion of this article was based on a document provided the Commission's services. B, DK and S entered reserves and D, F and GR scrutiny reserves on the text of the article.

New recital: "Whereas the Court of Justice has constantly held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State."

A and DK proposed that this recital be included in the body of the text.

NL and S proposed the deletion of the word 'consumer' in this indent. A, B, D, DK and F, however, wished to go further by adding a general exemption for international private law, an option which was opposed by IRL, LUX and UK. F also proposed replacing this indent with a new paragraph applying the law of the consumer's country of residence to contractual obligations. D, however, opposed this option.

The following specific issues were also raised in connection with this paragraph:
- employment contracts (A, ES)
- all areas covered by Art 1(2) of the Rome Convention, e.g. bills of exchange (A)
- criminal law (A)
- contracts regarding fixed property and financial arrangements involving third parties (FIN)
- the need to clarify the application of Article 5(2) of the Rome Convention to electronic commerce (I).

Recital (7) to read: "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; whereas, where provisions of the applicable law designated by rules of private international law are incompatible with the principles of free movement of Information Society services established in this Directive, the relevant provisions will have to be discarded;" D, F and NL considered this addition to the recital to be problematic.
4. Paragraph 1 and 2 shall not apply to the fields referred to in Annex I.

5. Member States may take measures\(^{27}\) to derogate from paragraph 2 in respect of a given Information Society service if the following conditions are fulfilled:

(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 a given 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,\(^{28}\)

(iii) proportionate to those objectives;

(b)\(^{30}\) prior to taking the measures in question and without prejudice to court proceedings, **including preliminary proceedings**, 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 they were inadequate;
- notified the Commission and the Member State referred to in Article 3(1) of its intention to take such measures.

6. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 5 point (b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in Article 3(1), indicating the reasons for which the Member State considers that there is urgency;

7. The Commission **has to examine** the compatibility of the measures with Community law **in the shortest possible time**; where it comes to the conclusion that the measure is **incompatible with Community law**, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

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\(^{27}\) A proposed the addition of "individual measures".

\(^{28}\) ES and P proposed the addition of "fundamental rights", whilst A, B, D and P also wished to add "the protection of ones reputation/honour". Other delegations and the Cion, however, were opposed to any extension of the list, whilst IRL, for its part, wished to shorten it by deleting the reference to "consumer protection".

\(^{29}\) A proposed the deletion of (a)(ii).

\(^{30}\) A and I proposed that this sub-paragraph be simplified.
CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an Information Society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect 31.

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 the Council.

Article 5

General information to be provided

1. In addition to other information requirements established by Community law 32, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:
   (a) the name of the service provider;
   (b) the geographic address at which the service provider is established;

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31 Recital reformulated to accommodate the concerns of P:
"Whereas the Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC consisting of the physical delivery of a printed e-mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification services;". A, nevertheless, wished to add a reference to "supervisory systems".

32 New part to be added to recital 14 in response to the concerns of the Italian delegation:
"Whereas this Directive complements information requirements established by the above mentioned Directives and in particular Directive 97/7/EC on the protection of consumers in respect of distance contracts."
(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 or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:
   - any professional body or similar institution with which the service provider is registered;
   - the professional title and the Member State where it has been granted;
   - a reference to the applicable professional rules in the Member State of establishment and the means to access them;[...]

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Council Directive 77/388/EEC as amended by the Council Directive 80/98/EC.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where Information Society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

33 D, F and FIN entered scrutiny reserves on this formulation.
34 I proposed that this indent also include a reference to the authorisation scheme number.
35 Reformulation to take into account the concerns of A and D.
36 B, GR, I and P opposed the deletion of this text.
Section 2 Commercial communications
Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of or constitute an Information Society service shall comply at least 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 permitted in the Member State where 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 clearly and unambiguously;
(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

37 A number of delegations were concerned about the lack of harmonisation in relation to commercial communication, with I entering a reserve on the whole article and D on subparagraphs (c) and (d). Following discussion of a document submitted by the Danish delegation, the Presidency agreed to explore in conjunction with the Commission whether to deal with the issues raised by DK in this Directive or in the wider context of the Council's work on consumer protection.

38 NL proposed moving "such as discounts, premiums and gifts" to a recital.
Article 7

Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously 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. 39

Article 8 40

Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of or constitute an Information Society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession. 41

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39 As a compromise between delegations favouring a Community-wide ban on 'spaming' without prior consent and the majority who preferred the 'opt-out' solution, the Presidency suggests maintaining the current exclusion from Art 3 (which will allow Member States wishing to do so to impose a ban at national level) and the addition of a second paragraph as proposed by the European Parliament and incorporated into the Commission's amended proposal. F and GR have already explicitly supported such an addition.

40 I maintained a scrutiny reserve on this article.

41 A and D reacted positively to the revised formulation of this paragraph, whilst nevertheless maintaining scrutiny reserves. NL remained concerned about the impact of the paragraph on the provision of medical services.
2. Without prejudice to the autonomy of professional bodies and associations, 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 commercial communication in conformity with the rules referred to in paragraph 1.

3. When elaborating [...] proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close co-operation with the relevant professional associations and bodies.  

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42 Further clarification of the text in the light of the discussion.
Section 3  Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither hamper 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 all or certain contracts falling into one of the following categories:
   (a) contracts that create or transfer rights in real estate, except for rental rights;
   (b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
   (c) [...];
   (d) contracts of suretyship granted and collateral securities furnished by [...] persons acting for purposes outside their trade, business or profession;
   (e) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every 5 years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the categories referred to in paragraphs 2 (b) [...] to which they do not apply paragraph 1.

Scrutiny reserves on the entire article were entered by B, D, and I.

Several delegations (A, DK, F, and S) preferred a simpler formulation of this paragraph which deleted the notion of "effective use". A and F also wished to add a further sentence, in effect requiring the use of an electronic signature.

Additional recital in response to the concerns of A and D:

Whereas Member States may maintain restrictions for the use of electronic contracts with regard to contract requiring by law the involvement of courts, public authorities, or professions exercising public authority; whereas this possibility covers also contracts requiring by law certification or attestation by a notary;

D requested the addition of a further exemption for employment contracts, whilst S wished to exclude all consumer credit contracts and A "bills of exchange". F and LUX also entered reserves on paragraph 2.
Article 10
Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;
(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;
(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

2a. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

3. Article 10 (1) and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

47 F proposed that certain provisions of the distance selling directive be repeated in this article.
48 F considered that the service provider should be obliged to store the contract.
49 F proposed the deletion of this paragraph, whilst D and FIN suggested the addition of a reference to sub-paragraph (2a).
Article 11
Placement of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where a recipient of a service [...] places his order through technological means, the following principles apply:
   - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means
   - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors [and accidental transactions], prior to the placing of the order.

3. [...]

4. Article 11(1) and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

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50 Most delegations supported the approach of the Presidency text to this article, although F, IRL and UK regretted the deletion of provisions harmonising the moment of conclusion of the contract.

51 NL and UK suggested replacing "the receipt" with "his acceptance", while NL also proposed adding a provision clarifying that, in the absence of an acknowledgement, no contract is concluded.

52 Five delegations (A, D, DK, P and S) expressed doubts about the usefulness of this second indent, with P also querying the value of the first indent. All other delegations nevertheless supported the Presidency text.

53 UK proposed the deletion of "and accidental transactions".

54 Six delegations (A, F, I, LUX, NL, and P) and the Cion supported the deletion of the reference to paragraph 11(1), whilst seven delegations (B, D, DK, FIN, GR, IRL, and UK) preferred the existing Presidency text.
Section 4 Liability of intermediary service providers

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 a recipient of the service, or the provision of access to a communication network, Member States shall provide in their legislation that the service provider shall not be liable 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

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55 DK, F, GR, I and S entered scrutiny reserves on Section 4, with DK querying the legal basis of these articles.

56 New recital agreed by the Group:
"Whereas the limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; whereas such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it."

57 NL proposed that Articles 12 and 13 be merged.

58 New recital: "Whereas a service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; whereas this requires among other things that he does not modify the information that he transmits; whereas this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission;".

New recital: "Whereas a service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities." P preferred to see the idea underlying this recital to be included in the substantive text of Article 12 and Article 13, perhaps using the formulation found in Article 14(2), whilst I requested that a reference to "hosting" be included. FIN entered a scrutiny reserve on these recitals.
(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.

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

**Article 13**

**Caching**

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall provide in their legislation that the service provider shall not be liable 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 widely recognised and used by industry;
   (d) the provider does not interfere with the **lawful use of** technology, widely recognised and used by industry, to obtain data on the use of the information; and

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59 Several delegations (A, DK, NL, and S) supported the addition of a further condition in Articles 12 and 13, the effect of which would be to admit the possibility that intermediaries could be liable where they had knowledge of illegal information/activity. B, ES and I, meanwhile, gave a favourable initial reaction to the Presidency compromise (cf. the final whereas clause in the new recital proposed fn 68).

60 A preferred to replace "recipient" with "third party".

61 FIN proposed that the text be reformulated to refer to liability for the content of the information stored.

62 D proposed to refer to "rules of care".
(e) the provider acts\(^63\) expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

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\(^63\) D, supported by A, NL and P, suggested the addition of "to the extent that this is technically feasible and can reasonably be expected."
Article 14
Hosting

1. Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall provide in their legislation that the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that:
   
   (a) the provider does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information 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.

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.

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64 D proposed a reference to the technical feasibility of such action.

65 I maintained a scrutiny reserve regarding the relationship of paragraph 2 with indents (a) and (b) of paragraph 1.

66 In response to concerns about freedom of expression, the Group agreed to this addition to the text and to the following recital, subject to scrutiny reserves entered by A, D, F and LUX:

"Whereas, in order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; whereas the removal or disabling of access has to be undertaken in the respect of the principle of freedom of expression and of procedures established for this purpose at national level; whereas in particular Member States have the possibility to establish that the removal of information or the disabling of access require a prior decision of a court or public authority taken in the shortest possible time;"
Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12 to 14, to monitor the information which they transmit or store, nor a general obligation actively\(^{67}\) to seek facts or circumstances indicating illegal activity.

2. \[\ldots\]\(^{68}\)

\(^{67}\) LUX proposed the deletion of the term 'actively'.

\(^{68}\) In the light of the discussion, the President suggested:

(i) that the substantive content of this paragraph be incorporated into the following revised recital:

"Whereas Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; whereas this does not concern monitoring obligations in a specific case and, in particular, does not affect orders 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 offences];"

\(\text{A, ES and I advocated the deletion of the words in square brackets, whilst P proposed the addition of a reference to } "\text{public health}". S wanted the text to leave open the possibility of general monitoring obligations, e.g. for bulletin boards. F, for its part, wished to preserve the possibility of obliging hosting service providers to maintain client lists.}\)

(ii) that a further whereas clause be added to the recital as follows:

"whereas this does not affect the possibility for Member States to establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken by recipients of their service."

\(\text{ES proposed an alternative formulation of this additional clause, whilst several delegations (A, B, F, I, NL and S) preferred to see its contents moved to the text itself, with A, I and NL wishing to see it transformed into a harmonised obligation on Member States (see also fn 59).}\)
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 or, professional associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(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.

In response to concerns expressed by A, D and P on the voluntary nature of these requirements, the following recital shall be added:

"Whereas Member States and the Commission shall encourage the drawing-up of codes of conduct; whereas this shall not impair the voluntary nature of such codes and the possibility for interested parties to freely decide whether to adhere to such codes;"

A proposed that notification should only be encouraged where there is a problem with the application of a code.

In response to concerns expressed by D, the following recital is proposed:

"Whereas the protection of minors and human dignity is the subject of Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity and European and Council Decision 276/1999/EC adopting a multi-annual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks; whereas the objective of these instruments is to promote among other actions industry self-regulation, content monitoring schemes, filtering tools and rating systems."

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2. Member States and the Commission shall encourage associations representing consumers to be involved in the drafting and implementation of codes of conduct affecting their interests and drawn up according to point (a) of paragraph 1. Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

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 the recipient of the service, their legislation does not hamper the use of out-of-court schemes for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

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

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72 Addition in response to the concerns of A.
73 LUX entered a reserve on this article, whilst the Cion entered a reserve on paragraph 2.
74 A, B, I, IRL and UK supported the deletion of "effective".
75 A and ES wished to insert a reference to national law.
76 Six delegations (A, D, I, IRL, NL and P) supported a proposal that the text be broadened to also cover business to business disputes.
77 Revised text in response to concerns of several delegations (A, D, ES, I, IRL, NL and UK).
78 A and I proposed that the text be amended to require the provision of regular reports, rather than significant decisions.
Article 18

Court actions

1. Member States shall ensure that **efficient** court actions **available under national law** concerning Information Society services’ activities allow for the rapid adoption of measures, **including interim measures**, designed to **terminate** any alleged infringement and to prevent any further impairment of the interests involved.

2. In the annex of Directive 98/27/EC the following point 11 is added:

   - Directive …/…./EC on certain legal aspects on Information Society services, in particular electronic commerce, in the Internal Market.

Article 19

Cooperation between authorities

1. Member States shall ensure that their 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 authorities cooperate with the authorities of other Member States; they shall, to that end, appoint one or several contact points, whose coordinates they shall communicate to the other Member States and to the Commission.

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79 Addition in response to the concerns of A, D and F.
80 Revised text in response to the concerns of several delegations.
81 New recital in response to the request of S:

"Whereas Directive 98/27/EC, which is applicable to Information Society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; whereas this mechanism will contribute to the free movement of Information Society services by ensuring a high level of consumer protection."

82 LUX entered a reserve on this article.
83 ES, with some support from A and I, suggested reformulating paragraph 1 to read: "Member States shall establish the appropriate schemes of supervision...". ES suggested similarly deleting all references to "competent/national authorities" in paragraphs 2, 3, and 5, whilst A proposed further simplification of paragraphs 2 to 5. B and D, for their part, considered paragraph 1 to be superfluous.
3. Member States shall, as quickly as possible, and in conformity with national law, 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 contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms

(b) obtain the particulars of authorities, associations or organisations from which they may obtain further information or practical assistance.

(c) [...]  

5. Member States shall encourage their authorities to inform the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

6. [...]  

7. Member States may ask the Commission to convene urgently the contact committee referred to in Article 22 in order to examine difficulties over the application of Article 3(1).

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84 Revised wording in response to the concerns of a number of delegations (A, B, D, DK, F, I, and NL).

85 Deletion of paragraph 6 in response to the concerns of A, B, ES, I and NL (some of whom also requested the deletion of paragraphs 5 and 7).
Article 20
Electronic media

[...]

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.  

86 A proposed a reference to "other legal remedies" after "sanctions", whilst D preferred a formulation based on the TV without frontiers directive.
CHAPTER IV
CONTACT COMMITTEE AND FINAL PROVISIONS

Article 22
Contact Committee

A contact committee shall be set up under the aegis of the Commission. It shall be composed of representatives of the Member States. It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.

Article 23
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, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of Information Society services, in particular with respect to consumer protection.  

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content.

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87 LUX proposed the addition of a reference to the Internal Market.
88 Revised text in response to the concerns of several delegations. IRL preferred to add a specific Article 14bis dealing with the liability of information location services, although this proposal was not supported by other delegations.
Article 24
Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within [...] 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 25
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 26
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament For the Council
The President The President

89 Several delegations (B, D, DK, NL and S) considered that more time for implementation was needed, whilst others (F, I, IRL, UK and the Cion) underlined the need for rapid transposition.
ANNEX I

Derogations from Article 3

As referred to in Article 3(4), Article 3 (1) and (2) do not apply to:
- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC and Directive 96/9/EC 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;
- Article 44 paragraph 2 of Directive 85/611/EEC;
- contractual obligations concerning consumer contracts;
- the permissibility of unsolicited commercial communications by electronic mail [...].

90 A and B entered scrutiny reserves on the contents of this Annex, whilst D entered a reserve on the final two indents. 91 FIN and P requested the addition of other provisions of this directive and a reference to Directive 93/22/EC. I, with support from ES, requested to exclude financial services generally, at least from Article 3. 92 Diverse views were expressed on this indent:
- certain delegations (A, D, and I) wished to delete "contractual", with D and I also proposing widening the indent to cover the "conclusion and content of consumer contracts";
- S, with some support from DK, suggested deleting the reference to "consumer contracts";
- F preferred to delete this indent and include a substantive rule on the law applicable to consumer contracts in Article 3. 93 Subject to progress on the Danish proposal mentioned in fn 37, D and DK supported the widening of this indent to cover all commercial communication. F, on the other hand, proposed deletion of the indent. 94 I proposed an additional indent covering promotional competitions (see fn 10).
OUTCOME OF PROCEEDINGS

from: Working Party on Economic Questions (Information Society services)
dated: 4/5 November 1999
No. prev. doc.: 12471/99 ECO 354 CONSOM 62 CODEC 634
No. Cion prop.: 5123/99 ECO 2 CODEC 6
electronic commerce in the Internal Market

The text of the above-mentioned draft Directive resulting from the meeting of the Working Party on 4 and 5 November 1999, together with footnotes indicating the positions of delegations and the Commission, can be found in the Annex.

It should be noted that new proposals from the Presidency, with a view to meeting the concerns of delegations, are highlighted in bold.
CHAPTER I
GENERAL PROVISIONS

Article 1
Objective and scope

1. This Directive seeks to contribute to the proper functioning of the Internal Market by ensuring 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, 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.

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1 Additional recital in response to concerns expressed by S, who nevertheless maintain a reserve on the article:
"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;".

2 A entered a reserve on this paragraph. I, for its part, queried the legal basis in relation to "court actions".
3. This Directive complements Community law applicable to Information Society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts\(^3\), including those adopted for the functioning of the Internal Market.

4. This Directive shall not apply to:
   (a) the field of taxation\(^5\),
   (b) questions relating to Information Society services covered by Directives 95/46/EC of the European Parliament and the Council and 97/66/EC of the European Parliament and the Council,\(^6\)

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\(^3\) A, DK, I, NL and S considered that the text should be broadened to include all national legislation consistent with Community acts. D, meanwhile, considered it important for the paragraph to clarify the cumulative nature of this directive with other Community instruments.

\(^4\) F proposed the addition of the following new paragraph: "This Directive is without prejudice to the Community and national actions taken in order to promote cultural and linguistic diversity, and to ensure the defence of pluralism."

\(^5\) In response to the concerns of ES and LUX the following recital was proposed by the Presidency: "Whereas this Directive does not aim to establish rules on fiscal obligations; whereas this Directive does not pre-empt the elaboration of future Community instruments concerning fiscal aspects of electronic commerce;".

\(^6\) Text and following recital agreed by the Group (subject to scrutiny reserves entered by B, F and P): "Whereas the protection of individuals with regard to the processing of personal data is solely governed by European Parliament and Council Directives 95/46/EC and 97/66/EC which are fully applicable to Information Society services; whereas these Directives already establish a 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 personal data between Member States; whereas the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; whereas this Directive cannot prevent the anonymous use of open networks such as the Internet;".
the following activities of Information Society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority;
- the representation of a client and defence of his interests before the courts;
- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

F maintained its reserve regarding the deletion of the Commission's powers to amend the content of paragraph 4 (c), although this is subject to an acceptable form of Comitology.

Reserves were entered by A and D on this indent.

A and D wished to add "..., before official authorities and in other legal disputes".

New text and recital in response to concerns expressed by several delegations:

"Whereas the exclusion of gambling activities from the scope of application of this directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; whereas this does not cover promotional competitions where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services;".

Certain delegations (B, GR, LUX and IRL) and the Cion proposed that this indent be transferred to Annex I, whereas I, for its part, proposed that promotional competitions be included in Annex I (see fn 92).

Diverse views were expressed on the desirability of further exclusions:

- I, with support from ES, requested the exclusion of financial services;
- A and NL proposed an exemption covering the sale/advertisement of pharmaceuticals, whilst D proposed that this should at least be excluded from Article 3. A also proposed exemptions for medical services and for confidentiality services;
- F and GR supported by the Cion, warned of the dangers of adding further exclusions.
Article 2
Definitions

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


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

12 New recital: "Whereas the definition of Information Society services already exists in Community law in the European Parliament and Council Directive 98/48/EC and in the European Parliament and Council Directive 98/84/EC; whereas this definition covers any service normally provided for remuneration, at a distance, 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 98/48 which do not imply data processing and storage are not covered by this definition;".

13 In response to the concerns of delegations about the impact of this Directive on employment contracts, the Presidency has reformulated Recital (3) as follows:
"Whereas Information Society services span a wide range of economic activities which take place on-line; whereas these activities can, in particular, consist of selling goods on-line; whereas activities such as the delivery of goods as such or the provision of services off-line are not covered; whereas Information Society services 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 services consisting of the transmission of 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 Directive 89/552 and radio broadcasting are not Information Society services because they are not provided at individual request; whereas by contrast services which are transmitted point to point, such as video on demand or the provision of commercial communications by e-mail are Information Society services; whereas the use of e-mail by natural persons acting outside their trade, business or profession is not an Information Society service; whereas the contractual relationship between an employee and his employer is not an Information Society service.".

A entered a reserve on the new wording, whilst D, ES, F, I, S and UK entered scrutiny reserves.
A and D maintained their request for an updated indicative list similar to that found in Annex V of the "Transparency Directive".

14 A requested the insertion of a recital to clarify that the wording of (b) and (d) covers all forms of legal entity.
(c) "established service provider"\textsuperscript{15}: a service provider who effectively pursues an economic activity using a fixed establishment\textsuperscript{16} for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

\textsuperscript{17}

(d) "recipient\textsuperscript{18} 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\textsuperscript{19};

(e) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;

\textsuperscript{15} Recital (9) amended to read: "Whereas the place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; whereas this requirement is also fulfilled where a company is constituted for a given period; 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 but the place where it pursues its economic activity; whereas in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; whereas in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the center of his activities relating to this particular service; UK proposed the deletion of the fourth and sixth "whereas" clauses in this recital, and of the corresponding definition, preferring to treat this issue in Article 3.

\textsuperscript{16} ES proposed the addition of "according to the legislation of each Member State".

\textsuperscript{17} F, I and P requested the addition of a definition of "intermediary".

\textsuperscript{18} A and D prefer the term "user".

\textsuperscript{19} A, D and NL proposed the deletion of "in particular ... accessible".
"commercial communication": 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 in themselves 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, particularly when this is without financial consideration.


²⁰ New definition in response to the concerns of UK.
"coordinated field": requirements laid down in Member States' legal systems applicable to Information Society service providers or Information Society services, regardless of whether they are of a general nature or specifically designed for them.

- The co-ordinated field concerns requirements with which the service provider has to comply in respect of:
  - the taking up of the activity of an Information Society service, such as requirements concerning qualifications, authorisation or notification schemes;
  - the pursuit of the activity of an Information Society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.

- The co-ordinated field does not cover requirements such as:
  - requirements applicable to goods as such,
  - requirements applicable to the delivery of goods,
  - requirements applicable to services not provided by electronic means;

DK entered a reserve and B, D, F, P and S scrutiny reserves on the new definition of "co-ordinated field". Most delegations nevertheless considered the text to be acceptable. The following specific remarks were made:

- Certain delegations (A, B, DK and S) wished to exclude contractual requirements, whilst I queried the inclusion of requirements regarding the fulfilment of contracts;
- A, B, DK and NL were opposed to the inclusion of criminal law matters;
- ES requested clarification that liability rules in respect of the last three bullet points of the definition also be excluded, whilst D wished to exclude contracts concluded incidentally by electronic means but not involving Information Society services as such;
- F proposed that the reference to 'advertising' in the second bullet point (first indent) be replaced by 'commercial communication'.

New recital: "Whereas the scope of the co-ordinated field is without prejudice to future Community harmonisation relating to Information Society services and to future legislation adopted at national level in accordance with Community law; whereas the co-ordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern requirements relating to goods such as safety standards or labelling obligations, or requirements relating to the delivery of goods, including the distribution of medicinal products;"
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 the coordinated field.

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

4. Paragraph 1 and 2 shall not apply to the fields referred to in Annex I.

5. Member States may take measures to derogate from paragraph 2 in respect of a given Information Society service if the following conditions are fulfilled:

   (a) the measures shall be:

      (i) necessary for one of the following reasons:

         - public policy, in particular the protection of minors, the prevention and investigation of crime or the fight against any incitement to hatred on grounds of race, sex, religion or nationality,
         - the protection of public health,
         - public security,

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23 B, DK and S entered reserves and D, F and GR scrutiny reserves on the text of the article.

24 New recital: "Whereas the Court of Justice has constantly held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State."

25 A and DK proposed that this recital be included in the body of the text.

26 Seven delegations (A, B, D, DK, I, NL and S) supported the addition of a provision indicating that Article 3(1) and (2) are without prejudice to international private law. However, other delegations (in particular ES, FIN, GR, IRL, LUX, P and UK) and the Cion were opposed to this, because of the lack of legal clarity as to the scope of international private law and as to the precise impact of such a provision.

27 Recital (7) to read: "Whereas this Directive does not aim to establish specific rules on international private law relating to conflicts of law or jurisdiction and is not a substitute to the relevant international conventions;"

28 A, B, DK and I supported a general exemption for all criminal law matters, whilst NL proposed more focussed exemptions to cover public order and illegal content. The remaining delegations considered that the reformulated version of paragraph 5 was sufficient.

A proposed the addition of "individual measures".
- consumer protection;

(ii) taken against a given 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 and without prejudice to court proceedings, including preliminary proceedings, 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 they were inadequate;

- notified the Commission and the Member State referred to in Article 3(1) of its intention to take such measures.

6. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 5 point (b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in Article 3(1), indicating the reasons for which the Member State considers that there is urgency;

7. The Commission has to examine the compatibility of the measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

29 ES and P proposed the addition of "fundamental rights", whilst A, B, D and P also wished to add "the protection of ones reputation/honour". Other delegations and the Cion, however, were opposed to any extension of the list, whilst IRL, for its part, wished to shorten it by deleting the reference to "consumer protection".

30 A proposed the deletion of (a)(ii).

31 A and I proposed that this sub-paragraph be simplified.
CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an Information Society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect 32.

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 the Council.

Article 5

General information to be provided

1. In addition to other information requirements established by Community law33, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:
   
   (a) the name of the service provider;
   
   (b) the geographic address at which the service provider is established;

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32 Recital reformulated to accommodate the concerns of P: "Whereas the Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC consisting of the physical delivery of a printed e-mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification services;". A, nevertheless, wished to add a reference to "supervisory systems".

33 New part to be added to recital 14 in response to the concerns of the Italian delegation: "Whereas this Directive complements information requirements established by the above mentioned Directives and in particular Directive 97/7/EC on the protection of consumers in respect of distance contracts."
(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 or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:
   - any professional body or similar institution with which the service provider is registered;
   - the professional title and the Member State where it has been granted;
   - a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Council Directive 77/388/EEC as amended by the Council Directive 80/98/EC.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where Information Society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

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34 D, F and FIN entered scrutiny reserves on this formulation.
35 I proposed that this indent also include a reference to the authorisation scheme number.
36 Reformulation to take into account the concerns of A and D.
37 B, GR, I and P opposed the deletion of this text.
Section 2  Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of or constitute an Information Society service shall comply at least 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 permitted in the Member State where 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 clearly and unambiguously;
(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Delegations agreed in principle on the desirability of greater harmonisation of commercial communications, although a majority of delegations preferred to do so in the context of the revision of the directive on misleading advertising. DK nevertheless maintained its proposal for a new article, whilst D suggested an alternative approach based on Article 10 of the TV without frontiers directive.

I entered a reserve on this article and D on sub-paragraphs (c) and (d).

NL proposed moving "such as discounts, premiums and gifts" to a recital.
Article 7
Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously 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. 41

Article 842
Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of or constitute an Information Society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession. 43

41 FIN, IRL, P and UK opposed the inclusion of this new paragraph, whilst I and NL entered scrutiny reserves. The following recital will be added in response to a request for clarification from D: "Whereas Member States who allow the sending of unsolicited commercial communication by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt out registers in which natural persons not wishing to receive such commercial communications can register themselves;"

42 I maintained a scrutiny reserve on this article.

43 A and D reacted positively to the revised formulation of this paragraph, whilst nevertheless maintaining scrutiny reserves. NL remained concerned about the impact of the paragraph on the provision of medical services.
2. Without prejudice to the autonomy of professional bodies and associations, 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 commercial communication in conformity with the rules referred to in paragraph 1.

3. When elaborating [...] proposals for Community initiatives 44 which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close co-operation with the relevant professional associations and bodies.

44 Further clarification of the text in the light of the discussion.
Section 3  Contracts concluded by electronic means

Article 945

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process do not create obstacles for the use of electronic contracts or result in such contracts being deprived of legal effect and validity on account of their having been made electronically46.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority47;

(c) [...];

(d) contracts of suretyship granted and collateral securities furnished by [...] persons acting for purposes outside their trade, business or profession;

(e) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every 5 years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the categories referred to in paragraphs 2 (b) [...] to which they do not apply paragraph 1.

45 Scrutiny reserves on the entire article were entered by B, D, and I.
46 Revised formulation in response to the concerns of A, DK, F, and S. A and F also wished to add a further sentence, in effect requiring the use of an electronic signature.
47 Additional recital in response to the concerns of A and D:

Whereas Member States may maintain restrictions for the use of electronic contracts with regard to contract requiring by law the involvement of courts, public authorities, or professions exercising public authority; whereas this possibility covers also contracts requiring by law certification or attestation by a notary;

48 D requested the addition of a further exemption for employment contracts, whilst S wished to exclude all consumer credit contracts and A "bills of exchange". F and LUX also entered reserves on paragraph 2.
Article 10
Information to be provided

1. In addition to other information requirements established by Community law\(^{49}\), Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

   (a) the different technical steps to follow to conclude the contract;
   (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;\(^{50}\)
   (c) the technical means for identifying and correcting input errors prior to the placing of the order;
   (d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

2a. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

3. Article 10 (1) and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.\(^{51}\)

\(^{49}\) F proposed that certain provisions of the distance-selling directive be repeated in this article.

\(^{50}\) F considered that the service provider should be obliged to store the contract.

\(^{51}\) F proposed the deletion of this paragraph, whilst D and FIN suggested the addition of a reference to sub-paragraph (2a).
Article 11
Placement of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where a recipient of a service [...] places his order through technological means, the following principles apply:
   - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means
   - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors [...], prior to the placing of the order.

3. [...]

4. Article 11(1) first indent and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

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52 Most delegations supported the approach of the Presidency text to this article, although F, IRL and UK regretted the deletion of provisions harmonising the moment of conclusion of the contract.

53 NL and UK suggested replacing "the receipt" with "his acceptance", while NL also proposed adding a provision clarifying that, in the absence of an acknowledgement, no contract is concluded.

54 Five delegations (A, D, DK, P and S) expressed doubts about the usefulness of this second indent, with P also querying the value of the first indent. All other delegations nevertheless supported the Presidency text.

55 UK proposed the deletion of "and accidental transactions".

56 Compromise text suggested by the Presidency.
Section 4 Liability of intermediary service providers

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 a recipient of the service, or the provision of access to a communication network, Member States shall provide in their legislation that the service provider shall not be liable 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

DK, F, GR, I and S entered scrutiny reserves on Section 4, with DK querying the legal basis of these articles.

New recital agreed by the Group: "Whereas the limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; whereas such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it."

NL proposed that Articles 12 and 13 be merged.

New recital: "Whereas a service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; whereas this requires among other things that he does not modify the information that he transmits; whereas this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission."

New recital: "Whereas a service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities."

P preferred to see the idea underlying this recital to be included in the substantive text of Article 12 and Article 13, perhaps using the formulation found in Article 14(2), whilst I requested that a reference to "hosting" be included. FIN entered a scrutiny reserve on these recitals.
(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.

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

**Article 13**

**Caching**

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient\(^62\) of the service, Member States shall provide in their legislation that the service provider shall not be liable for the automatic, intermediate and temporary storage of that information\(^63\), 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\(^64\) regarding the updating of the information, specified in a manner widely recognised and used by industry;
   (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

\(^{61}\) Several delegations (A, DK, NL, and S) supported the addition of a further condition in Articles 12 and 13, the effect of which would be to admit the possibility that intermediaries could be liable where they had knowledge of illegal information/activity. B, ES and I, meanwhile, gave a favourable initial reaction to the Presidency compromise (cf. the final whereas clause in the new recital proposed in fn 70).

\(^{62}\) A preferred to replace "recipient" with "third party".

\(^{63}\) FIN proposed that the text be reformulated to refer to liability for the content of the information stored.

\(^{64}\) D proposed to refer to "rules of care".
(e) the provider acts\textsuperscript{65} expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

\textsuperscript{65} D, supported by A, NL and P, suggested the addition of "to the extent that this is technically feasible and can reasonably be expected,".
Article 14
Hosting

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

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

   (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. 66

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider. 67

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information 68.

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66 D proposed a reference to the technical feasibility of such action.
67 I maintained a scrutiny reserve regarding the relationship of paragraph 2 with indents (a) and (b) of paragraph 1.
68 In response to concerns about freedom of expression, the Group agreed to this addition to the text and to the following recital, subject to scrutiny reserves entered by A, D, F and LUX: "Whereas, in order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; whereas the removal or disabling of access has to be undertaken in the respect of the principle of freedom of expression and of procedures established for this purpose at national level; whereas in particular Member States have the possibility to establish that the removal of information or the disabling of access require a prior decision of a court or public authority taken in the shortest possible time;"
Article 15
No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12 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. [...]

2bis [Member States may establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged activities undertaken by recipients of their service.] 70

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69 LUX proposed the deletion of the term 'actively'.
70 In the light of the discussion, the President suggested:

(i) that the substantive content of paragraph 2 be incorporated into the following revised recital:
"Whereas Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; whereas this does not concern monitoring obligations in a specific case and, in particular, does not affect orders 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 offences];"

A, ES and I advocated the deletion of the words in square brackets, whilst P proposed the addition of a reference to "public health". S wanted the text to leave open the possibility of general monitoring obligations, e.g. for bulletin boards. F, for its part, wished to preserve the possibility of obliging hosting service providers to maintain client lists and communicating such details to the judicial authorities.

(ii) that a further whereas clause be added to the recital as follows, together perhaps with a new paragraph 2bis:
"whereas this does not affect the possibility for Member States to establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken by recipients of their service."

ES proposed an alternative formulation of this additional clause, whilst several delegations (A, B, F, I, NL and S) preferred to see its contents moved to the text itself, with A, I and NL wishing to see it transformed into a harmonised obligation on Member States (see also fn 61).
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 or, professional associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(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.

71 The following new recital was agreed:

"Whereas Member States and the Commission shall encourage the drawing-up of codes of conduct; whereas this shall not impair the voluntary nature of such codes and the possibility for interested parties to freely decide whether to adhere to such codes;".

72 In response to concerns expressed by D, the following recital is proposed:

"Whereas the protection of minors and human dignity is the subject of Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity and European and Council Decision 276/1999/EC adopting a multi-annual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks; whereas the objective of these instruments is to promote among other actions industry self-regulation, content monitoring schemes, filtering tools and rating systems."

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2. Member States and the Commission shall encourage associations representing consumers to be involved in the drafting and implementation of codes of conduct affecting their interests and drawn up according to point (a) of paragraph 1. Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

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 the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

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

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73 Addition in response to the concerns of A.
74 LUX maintained a scrutiny reserve on this article.
Article 18
Court actions

1. Member States shall ensure that [...]

2. In the annex of Directive 98/27/EC the following point 11 is added:
   - Directive …./…./EC on certain legal aspects on Information Society services, in particular electronic commerce, in the Internal Market.

Article 19
Cooperation between authorities

1. Member States shall [...] have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall [...] cooperate with [...] other Member States; they shall, to that end, appoint one or several contact points, whose coordinates they shall communicate to the other Member States and to the Commission.

F entered a scrutiny reserve on the deletion of "efficient".

New recital agreed:
"Whereas Directive 98/27/EC, which is applicable to Information Society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; whereas this mechanism will contribute to the free movement of Information Society services by ensuring a high level of consumer protection."

LUX entered a reserve on this article.

Drafting modifications to paragraphs 1, 2, 3 and 5 are suggested by the Presidency with a view to meeting the concerns of ES, who had been supported in their concerns by A, B and I.
3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by [...] other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points\(^79\) which shall be accessible at least by electronic means and from which recipients and service providers may:

   (a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms

   (b) obtain the particulars of authorities, associations or organisations from which they may obtain further information or practical assistance.

   (c) [...] 

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

6. [...] 

7. [...] 

\(^{79}\) A queried the reference to "contact points".
Article 20
Electronic media

[...]

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.  

\(^{80}\) In response to the concerns of A and D, the following recital, based on Recital 23 of Directive 98/84/EC, will be added: "Whereas the sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; whereas Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive;"
CHAPTER IV
[...] FINAL PROVISIONS

Article 22\textsuperscript{81}

[...]  

Article 23
Re-examination

1. Not later than [three years] after the adoption of this Directive, and thereafter every two years\textsuperscript{82}, 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 legal, technical and economic developments in the field of Information Society services, in particular with respect to consumer protection. \textsuperscript{83}

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. \textsuperscript{84}

\textsuperscript{81} In response to the concerns of a number of delegations that this type of committee was not covered by the recent Comitology decision, this article together with Art 19(7) has been deleted.

\textsuperscript{82} A and D proposed a five yearly interval, but this was strongly opposed by a majority of delegations.

\textsuperscript{83} LUX proposed the addition of a reference to the Internal Market.

\textsuperscript{84} IRL preferred to add a specific Article 14bis dealing with the liability of information location services, although this proposal was not supported by other delegations.
Article 24
Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within [...] 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 25
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 26
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament For the Council
The President The President

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85 Several delegations (B, D, DK, NL and S) considered that more time for implementation was needed, whilst others (F, I, IRL, UK and the Cion) underlined the need for rapid transposition.
ANNEX I

**Derogations from Article 3**

As referred to in Article 3(4), Article 3(1) and (2) do not apply to:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC and Directive 96/9/EC 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;
- Article 44 paragraph 2 of Directive 85/611/EEC;
- the designation of competent courts,
- contractual obligations where the parties have chosen or are free to choose the law applicable,
- contractual obligations concerning consumer contracts,
- formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated;
- the permissibility of unsolicited commercial communications by electronic mail [...].

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86 A and B entered reserves on the contents of this Annex.
87 P requested a reference to other provisions of this directive and an additional reference to Article 13 of Directive 93/22/EC. I, with support from B and ES, requested to exclude financial services generally, at least from Article 3 (see fn 11).
88 The first option was preferred by F, GR, IRL, LUX and UK, whilst A, D and FIN preferred the second option.
89 Pending the discussion of the link with international private law (see fn 25), certain delegations (A, D and I) requested clarification, perhaps by way of a recital, that provisions concerning the conclusion of consumer contracts were also covered by this exclusion. F, however, preferred to delete this indent entirely and replace it with a substantive rule on the law applicable to consumer contracts in Article 3.
90 This text was favourably received although most delegations entered scrutiny reserves. A further recital will be added to indicate that this directive has no impact on rights in rem and aspects relating to the recovery of debts.
91 In the absence of progress on further harmonisation (see fn 38), D and DK supported the widening of this indent to cover all commercial communication. On the other hand, F, supported by LUX, proposed deletion of the indent.
92 I proposed an additional indent covering promotional competitions (see fn 10), whilst NL proposed a new exemption for medical services.
COUNCIL OF THE EUROPEAN UNION

Brussels, 12 November 1999

12666/99

LIMITE

ECO 363
CONSOM 67
CODEC 654

OUTCOME OF PROCEEDINGS
from : Working Party on Economic Questions (Information Society services)
dated : 11/12 November 1999
to : COREPER
No. prev. doc.: 12645/99 ECO 362 CONSOM 64 CODEC 651
No. Cion prop.: 5123/99 ECO 2 CODEC 6

Delegations will find attached the text of the above-mentioned draft Directive resulting from the work undertaken by the Working Party.
The remaining reserves of delegations and the Commission are set out in the Report of the Working Party to COREPER is contained in doc. 12667/99 ECO 364 CONSOM 67 CODEC 655.
CHAPTER I
GENERAL PROVISIONS

Article 1
Objective and scope

1. This Directive seeks to contribute to the proper functioning of the Internal Market by ensuring 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, certain national provisions on Information Society services relating to the Internal Market, 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.

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1 New recital agreed:
"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; whereas this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression."
3. This Directive complements Community law applicable to Information Society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them insofar as this does not restrict the freedom to provide Information Society services.

2 Text and Recital 14 as reformulated by the Presidency to meet the concerns of several delegations:

4. This Directive shall not apply to:
   (a) the field of taxation\(^3\),
   (b) questions relating to Information Society services covered by Directives 95/46/EC of the European Parliament and the Council and 97/66/EC of the European Parliament and the Council,\(^4\)

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\(^3\) New recital agreed: "Whereas this Directive does not aim to establish rules on fiscal obligations; whereas this Directive does not pre-empt the elaboration of Community instruments concerning fiscal aspects of electronic commerce;".

\(^4\) Text and following recital agreed: "Whereas the protection of individuals with regard to the processing of personal data is solely governed by European Parliament and Council Directives 95/46/EC and 97/66/EC which are fully applicable to Information Society services; whereas these Directives already establish a 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 personal data between Member States; whereas the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; whereas this Directive cannot prevent the anonymous use of open networks such as the Internet;".
(c) the following activities of Information Society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority;
- the representation of a client and defence of his interests before the courts;
- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions\(^5\)

5. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism\(^6\).

\(^5\) Text and new recital agreed:
"Whereas the exclusion of gambling activities from the scope of application of this directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; whereas this does not cover promotional competitions where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services;".

\(^6\) New formulation proposed by the Presidency.
For the purpose of this Directive, the following terms shall bear the following meanings:


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

7 New recital agreed: "Whereas the definition of Information Society services already exists in Community law in the European Parliament and Council Directive 98/48/EC and in the European Parliament and Council Directive 98/84/EC; whereas this definition covers any service normally provided for remuneration, at a distance, 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 98/48 which do not imply data processing and storage are not covered by this definition;".

8 Reformulation of Recital (3) in response to concerns about the impact on employment contracts:
"Whereas Information Society services span a wide range of economic activities which take place on-line; whereas these activities can, in particular, consist of selling goods on-line; whereas activities such as the delivery of goods as such or the provision of services off-line are not covered; whereas Information Society services 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 services consisting of the transmission of 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 Directive 89/552 and radio broadcasting are not Information Society services because they are not provided at individual request; whereas by contrast services which are transmitted point to point, such as video on demand or the provision of commercial communications by e-mail are Information Society services; whereas the use of e-mail by natural persons acting outside their trade, business or profession is not an Information Society service; whereas the contractual relationship between an employee and his employer is not an Information Society service".
(c) "established service provider"\textsuperscript{9}: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, 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) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;

\textsuperscript{9} Reformulated recital (9) agreed: "Whereas the place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; whereas this requirement is also fulfilled where a company is constituted for a given period; 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 but the place where it pursues its economic activity; whereas in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; whereas in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service;".
"commercial communication": 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 in themselves 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, particularly when this is without financial consideration.


"coordinated field": requirements laid down in Member States' legal systems applicable to Information Society service providers or Information Society services, regardless of whether they are of a general nature or specifically designed for them.
- The co-ordinated field concerns requirements with which the service provider has to comply in respect of:
  . the taking up of the activity of an Information Society service, such as requirements concerning qualifications, authorisation or notification schemes;
  . the pursuit of the activity of an Information Society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.
- The co-ordinated field does not cover requirements such as:
  . requirements applicable to goods as such,
  . requirements applicable to the delivery of goods,
  . requirements applicable to services not provided by electronic means;\(^{10}\)

**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 the co-ordinated field.

2. Member States may not, for reasons falling within the co-ordinated field, restrict the freedom to provide Information Society services from another Member State\(^ {11}\).

4. Paragraph 1 and 2 shall not apply to the fields referred to in Annex I.

\(^{10}\) New recital agreed: "Whereas the scope of the co-ordinated field is without prejudice to future Community harmonisation relating to Information Society services and to future legislation adopted at national level in accordance with Community law; whereas the co-ordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern requirements relating to goods such as safety standards or labelling obligations, or requirements relating to the delivery of goods, including the distribution of medicinal products;".

\(^{11}\) New recital: "Whereas the Court of Justice has constantly held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State."

\(^{12}\) Recital (7) to read: "Whereas this Directive does not aim to establish specific rules on international private law relating to conflicts of law or jurisdiction and is not a substitute to the relevant international conventions;".
5. Member States may take measures to derogate from paragraph 2 in respect of a given Information Society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:
   - public policy, in particular the protection of minors, or the prevention and investigation of crime, in particular 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 a given 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 and without prejudice to court proceedings, including preliminary proceedings, 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 they were inadequate;
   - notified the Commission and the Member State referred to in Article 3(1) of its intention to take such measures.

6. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 5 point (b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in Article 3(1), indicating the reasons for which the Member State considers that there is urgency.

7. The Commission has to examine the compatibility of the measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.
CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an Information Society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect 13.

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 the Council.

Article 5

General information to be provided

1. In addition to other information requirements established by Community law 14, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

   (a) the name of the service provider;
   (b) the geographic 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 or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

13 New recital agreed: "Whereas the Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC consisting of the physical delivery of a printed e-mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification services;".

14 New part to be added to recital 14 agreed: "Whereas this Directive complements information requirements established by the above mentioned Directives and in particular Directive 97/7/EC on the protection of consumers in respect of distance contracts."
(e) where the activity is subject to an authorisation scheme the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:
   - any professional body or similar institution with which the service provider is registered;
   - the professional title and the Member State where it has been granted;
   - a reference to the applicable professional rules in the Member State of establishment and the means to access them[...];

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Council Directive 77/388/EEC as amended by the Council Directive 80/98/EC.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where Information Society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2 Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of or constitute an Information Society service shall comply at least 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 permitted in the Member State where 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 clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.
Article 7
Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously 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. 15

Article 8
Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of or constitute an Information Society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, 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 commercial communication in conformity with the rules referred to in paragraph 1.

3. When elaborating [...] proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close co-operation with the relevant professional associations and bodies.

15 The following additional recital was agreed: "Whereas Member States who allow the sending of unsolicited commercial communication by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt out registers in which natural persons not wishing to receive such commercial communications can register themselves;".
Section 3  Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process do not create obstacles for the use of electronic contracts or result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.16

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:
   (a) contracts that create or transfer rights in real estate, except for rental rights;
   (b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority17;
   (c) [...];
   (d) contracts of suretyship granted and collateral securities furnished by [...] persons acting for purposes outside their trade, business or profession;

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16 Revised text and following recitals agreed:
"Whereas Member States may establish specific legal requirements for electronic contracts, in particular requirements concerning secure electronic signatures, provided that these requirements can be fulfilled by electronic means;"
"Whereas Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; whereas this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have effects with regard to third parties; whereas this possibility covers also contracts requiring certification or attestation by a notary;"
"Whereas Member States' obligation to remove obstacles for the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility to use electronic means in certain cases;"
"Whereas Member States' obligation to remove obstacles for the use of electronic contracts shall be implemented in conformity with legal requirements for contracts enshrined in Community law;".

17 New recital agreed:
"Whereas Member States may maintain restrictions for the use of electronic contracts with regard to contract requiring by law the involvement of courts, public authorities, or professions exercising public authority; whereas this possibility covers also contracts requiring by law certification or attestation by a notary;".
contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every 5 years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the categories referred to in paragraphs 2 (b) [...] to which they do not apply paragraph 1.

**Article 10**

**Information to be provided**

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

   (a) the different technical steps to follow to conclude the contract;
   (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
   (c) the technical means for identifying and correcting input errors prior to the placing of the order;
   (d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

2a. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

3. Article 10 (1) and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.
Article 11

Placement of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where a recipient of a service [...] places his order through technological means, the following principles apply:

   - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means

   - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors [...] prior to the placing of the order.

3. [...]  

4. Article 11(1) first indent and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.
Section 4  Liability of intermediary service providers

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 a recipient of the service, or the provision of access to a communication network, Member States shall provide in their legislation that the service provider shall not be liable 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

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18 New recital agreed:
"Whereas the limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; whereas such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it."

19 The following new recitals agreed:
"Whereas a service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; whereas this requires among other things that he does not modify the information that he transmits; whereas this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission;"
"Whereas a service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities."
(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.

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

**Article 13**

**Caching**

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall provide in their legislation that the service provider shall not be liable 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 widely recognised and used by industry;
   (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
   (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disabling.

2. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.
Article 14
Hosting

1. Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall provide in their legislation that the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that:
   
   (a) the provider does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information 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.

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.¹²

¹² The following recital was agreed:
"Whereas, in order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; whereas the removal or disabling of access has to be undertaken in the respect of the principle of freedom of expression and of procedures established for this purpose at national level; whereas in particular Member States have the possibility to establish that the removal of information or the disabling of access require a prior decision of a court or public authority taken in the shortest possible time;".
Article 15
No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12 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. [...]

2bis Member States may establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities or information undertaken by recipients of their service. ²¹

²¹ New recital agreed:

"Whereas Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; whereas this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation;".
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 or, professional associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;
   (b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;
   (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. Member States and the Commission shall encourage the involvement of associations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up according to point (a) of paragraph 1. Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

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 the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

22 The following new recital was agreed:
"Whereas Member States and the Commission shall encourage the drawing-up of codes of conduct; whereas this shall not impair the voluntary nature of such codes and the possibility for interested parties to freely decide whether to adhere to such codes;".
2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant 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 [...] court actions available under national law concerning Information Society services’ activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. In the annex of Directive 98/27/EC the following point 11 is added:

- Directive …/…./EC on certain legal aspects on Information Society services, in particular electronic commerce, in the Internal Market. 23

Article 19
Cooperation

1. Member States shall [...] have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall [...] cooperate with [...] other Member States; they shall, to that end, appoint one or several contact points, whose coordinates they shall communicate to the other Member States and to the Commission.

23 New recital agreed:
"Whereas Directive 98/27/EC, which is applicable to Information Society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; whereas this mechanism will contribute to the free movement of Information Society services by ensuring a high level of consumer protection."
3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by [...] other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms

(b) obtain the particulars of authorities, associations or organisations from which they may obtain further information or practical assistance.

(c) [...] 

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

6. [...] 

7. [...] 

**Article 20**

**Electronic media**

 [...] 

**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.  

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24 New recital agreed: "Whereas the sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; whereas Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive;".
CHAPTER IV

[... ] FINAL PROVISIONS

Article 22

[... ]

Article 23

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, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of Information Society services, in particular with respect to consumer protection.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content.

Article 24

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within [...] 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 25

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 26
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

Derogations from Article 3

As referred to in Article 3(4), Article 3 (1) and (2) do not apply to:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC and Directive 96/9/EC 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;

- Article 44 paragraph 2 of Directive 85/611/EEC;


- the designation of competent courts;

- contractual obligations where the parties [have chosen] [are free to choose] the law applicable contractual obligations concerning consumer contracts;

- formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated;

- the permissibility of unsolicited commercial communications by electronic mail [...].
I. INTRODUCTION

The rapporteur, Ms ODDY (PSE-UK), presented a report on behalf of the Committee on Legal Affairs and Citizens' Rights containing 68 amendments to the proposal for a Directive.

The aim of the amendments proposed in the report is to clarify providers' liabilities and to reinforce consumer protection even further. The Committee endorses the underlying principle of the Commission's proposal, namely that information society services must, with certain exceptions, comply with the law of the country in which the service provider is established.

In the plenary debate, the rapporteur stressed the importance of reinforcing consumer protection in the field of electronic commerce by means of clear and easily-applicable legal instruments and highlighted the difficulty of harmonising legislation in this area. She said that the proposed amendments struck the right balance between the various interests at stake.
The political groups expressed their general support for the proposal for a Directive and the overall approach of the report, however there were widely diverging views on certain key issues such as ways of dealing with junk mail and spamming, on liability and on the question of means of surveillance.

On behalf of the Commission, Mr LIIKANEN welcomed the fact that the Parliament endorsed the approach and the broad lines of the proposal for a Directive, in particular the principles of the internal market. Naming the amendments concerned, he said that most of those proposed in the report were acceptable, either in whole or subject to redrafting, as they clarified and improved upon the original text of the proposal. He then stated the reasons for rejecting the amendments which the Commission did not find acceptable.

II. VOTE

Of the 76 amendments originally tabled (68 in the report and 8 proposed by the political groups), 71 were put to the vote (amendments 31 and 41 were excluded as they were of a linguistic nature, amendments 35 and 66 were incorporated into amendments 34 and 65 respectively, and amendment 71 was withdrawn). The plenary adopted 60 amendments, despite the fact that some only won a small number of votes (approximately 200-230 votes for). Some 400 MEPs voted.

The Parliament's amendments may be grouped as follows:

1. Common legal framework (amendments 1, 2, 3, 4, 5, 6, 8, 19, 21, 22 and 68)

The purpose of this group of amendments, most of which involve the addition of new recitals, is to highlight the advantages to be reaped from the single market in the field of electronic commerce by means of establishing a clear and simple common legal framework consistent with the rules applicable at international level.

The Commission approved amendments 1, 2, 4, 6 (in English only), 19 and 22 in their entirety. It could approve amendments 3 and 5 subject to redrafting. However, it rejected amendment 8 since its wording was not sufficiently clear from a legal point of view, and amendments 21 and 68 because they would be too ambitious at this stage and in the light of the present level of Community integration.
(2) Information society (amendments 23, 24 and 25)

These amendments, in the form of recitals, deal with the Directive's impact on the development of the information society, in particular in relation to public policy and the achievement of social, cultural and democratic goals (amendment 23). Whilst preserving freedom of expression (amendment 24), under certain circumstances the Member States may take measures to restrict the free movement of information society services (amendment 25).

The Commission could agree to amendment 25 subject to redrafting. It did not give an opinion on amendment 23, while its position on amendment 24 remains confused (in his intervention in the plenary session, Mr LIIKANEN had included amendment 24 on both the list of acceptable amendments and the list of unacceptable amendments).

(3) Exclusion of television broadcasting services (amendments 27 and 63)

These amendments are intended to exclude television broadcasting services within the meaning of Directives 89/552/EEC and 97/36/EC from the scope of the present Directive (these amendments received 256 votes for, 152 against, 4 abstentions and 221 for, 199 against and 3 abstentions respectively).

The Commission rejected these amendments since they changed the scope of the Directive in a manner which was not consistent with other Directives on the information society.

(4) Opt-out clause on unsolicited commercial communications (amendments 11 and 38)

These amendments not only lay down that unsolicited commercial communications should be identifiable as such, they also provide for the setting up of opt-out registers (or "Robinson lists") in which consumers who do not wish to receive that kind of communication can have themselves entered.

Subject to any necessary modifications, the Commission was prepared to accept amendment 11 and part of amendment 38.
(5) **Definitions (amendments 17, 29, 30 and 32)**

These amendments modify some of the definitions laid down in Article 2. For instance, amendment 17 clarifies, in the form of a recital, the definition of "recipient of a service". Amendment 29 replaces all of the definitions set out in point (a) (information society services) by a reference to Directive 83/189/EEC on technical standards and regulations. Amendment 30 slightly rewords the definition of "established service provider". Lastly, amendment 32 introduces a definition of "consumer".

The Commission approved amendments 17 and 32. It could accept, subject to rewording, amendment 29. It was unable to agree to amendment 30, as the deletion of the word "economic" to describe the activity of the service provider could lead to legal uncertainty.

(6) **Information to be provided (amendments 33, 34 and 37)**

These amendments flesh out Articles 5 and 6, in particular with references to Directive 97/7/EC, to price certainty and to the role of the Member States in the authorisation of promotional offers, competitions or games.

The Commission approved these amendments.

(7) **Confidentiality (amendments 13 and 39)**

These amendments introduce references to the protection of confidentiality in commercial communications, stressing the importance of maintaining the use of cryptographic methods or tools.

The Commission approved amendment 13 but rejected amendment 39 as its purpose was not sufficiently clear, which could have led to legal uncertainty.
Electronic contracts (amendments 12, 40, 42 and 73)

These amendments make changes, in particular to Articles 9 and 11, with the main aim of reinforcing consumer protection in relation to electronic contracts. A reference to Directive 92/28/EEC was added to the list in recital 14 (amendment 12). Amendment 40 deletes the provision allowing for the list of categories of contract provided for in Article 9(2) to be amended by committee procedure. Amendment 42 removes the requirement for the service recipient to confirm receipt of the acknowledgement of receipt as an element of the conclusion of the contract. Amendment 73 (216 votes for, 181 against, 10 abstentions) increases the service provider's obligations before the conclusion of the contract, information on which the recipient must be able to print and reproduce in a permanent manner.

The Commission approved amendments 12 and 40. Subject to redrafting, it could also agree to amendment 73 in part. It was unable to approve amendment 42 as it stood, but Mr LIIKANEN acknowledged that the question of when a contract was to be deemed to have been concluded (Article 11(1)) and the European Parliament's wish to simplify the contractual procedure should be re-examined during preparation of the amended proposal.

Liability of intermediaries (amendments 14, 15, 43, 45, 46, 47, 48 and 49)

The purpose of this group of amendments is to increase the obligations of intermediary service providers (amendment 43) as the party responsible for the transmission of, storage of, access to (amendment 48) and hosting of information.

The objective of amendment 14, in the form of a recital, is for Member States to encourage voluntary agreements to prevent illegal activities, without precluding the operation of surveillance instruments and technical systems of protection and identification (this amendment received 217 votes for, 176 against and 5 abstentions). The goal of amendment 15, also in the form of a recital, is the parallel entry into force of this Directive and the Directive on copyright in the information society.

Amendment 45 adds to Article 12(1) an additional condition for exempting the service provider from liability in the case of simple transmission: the installation of operational means of surveillance on a statutory or voluntary basis (206 votes for, 193 against, 1 abstention). Amendment 46 is intended to reinforce the confidentiality of storage (192 votes for, 174 against, 43 abstentions). Amendments 47 and 48 (the latter obtained 220 votes for, 175 against and 3 abstentions) tighten the conditions for exempting the service provider from liability with regard to "caching" and access and hosting respectively (Articles 13 and 14). Amendment 49 rephrases Article 14(2).
The Commission approved amendment 43 and, subject to redrafting, amendment 15 and part of amendment 14. It rejected amendments 45 to 49 since they upset the delicate balance sought in the proposed Directive, which was the outcome of a compromise taking account of the various interests at stake.

(10) **Illegal content (amendments 10, 53, 54 and 62)**

In particular on the basis of newly introduced references to Directives 95/46/EC and 97/66/EC, these amendments aim to underpin measures to counteract the use of illegal content by means of a derogation from the principle enshrined in Article 15 that service providers do not have any obligations regarding surveillance (amendments 53 and 54 received 235 votes for, 186 against and 1 abstention and 237 for, 184 against and 1 abstention respectively).

The Commission approved amendment 62. It rejected amendment 10 as incompatible with the data protection provisions. It also rejected amendments 53 and 54 because they upset the balanced compromise which the proposal for a Directive struck between the various interests at stake.

(11) **Codes of conduct (amendments 7, 55, 56, 57, 58, 59 and 64)**

The Parliament wished to strengthen the role of consumer associations or organisations representing holders of literary and artistic property rights (amendments 55, 56 and 58) as well as the protection of minors and human dignity (amendments 7, 57 and 64) in the drawing-up of codes of conduct. Amendment 59 allows for the use of notification and deletion procedures, including by electronic means.

The Commission approved amendments 7, 55, 56 and 57. It rejected amendments 58, 59 and 64 as their wording was not sufficiently clear, leading to a problem of legal uncertainty.

(12) **Legal remedies (amendments 16, 61 and 60)**

The purpose of these amendments is for Member States to facilitate remedies via electronic networks (amendments 16 and 60) and to ensure that court actions are not inadmissible when transmitted by electronic means or drafted in a Community language other than that of the Member State where the court is located (amendment 61).
The Commission approved amendment 16. It rejected amendment 60 as it was not sufficiently clear from a legal point of view. It also rejected amendment 61 as it was too ambitious given the current level of Community integration, although Mr LIIKANEN acknowledged that means of redress did have to be improved, in particular in the case of cross-border contracts.

(13) Review (amendments 65 and 57)

The aim of these amendments is to determine the content of the regular reports which the Commission must submit to the Parliament, the Council and the ESC in accordance with Article 24.

The Commission approved these amendments.

(14) Other

Amendment 9 removes part of recital 7.

Amendment 18 introduces a new recital advocating the establishment of industry agreements and standards.

Amendment 20 introduces a new recital commending electronic commerce as a means of providing public services in the cultural, educational and linguistic fields.

Amendment 26 introduces a recital concerning the derogation from the "country of origin" clause (Annex II, first indent) for copyright and neighbouring rights.

Amendment 28 adds details to Article 1(3).

The Commission approved amendments 18 and 20. Subject to redrafting, it could accept part of amendment 9. It rejected amendments 26 and 28; the first because it gave rise to a problem of legal uncertainty, and the second because it was not compatible with the data protection provisions.

The text of the adopted amendments and the European Parliament's Resolution is set out in Annex to this note.
**Legal aspects of electronic trading***

**A4-0248/99**


The proposal was approved with the following amendments:

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendments by Parliament</th>
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<tbody>
<tr>
<td>(Amendment 1)</td>
<td></td>
</tr>
<tr>
<td>Recital 2</td>
<td>(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;</td>
</tr>
<tr>
<td></td>
<td>(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, 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;</td>
</tr>
<tr>
<td>Amendment 2</td>
<td>(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;</td>
</tr>
<tr>
<td>Recital 2a (new)</td>
<td></td>
</tr>
</tbody>
</table>

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1 OJ C 30, 5.2.1999, p. 4.
(Amendment 3)
Recital 4a (new)

(4a) Whereas, in order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and uniform general framework to cover all the legal aspects of electronic commerce in the internal market;

(Amendment 4)
Recital 5a (new)

(5a) Whereas it is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with the Television Without Frontiers Directive, a high level of Community integration should be achieved;

(Amendment 5)
Recital 5b (new)

(5b) 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 as well as a common and strong negotiating position in international fora;

(Amendment 6)
Recital 5c (new)

(5c) 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;
(Amendment 7)
Recital 6

(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;

(Amendment 8)
Recital 6a (new)

(6a) Whereas technological development has multiplied and diversified the vehicles for creation, production and operation; whereas the legal framework for Information Society services should not differ overly from the current rules on other ways of exploiting works so as not to create distortions of competition;

(Amendment 9)
Recital 7

(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;
(Amendment 10)
Recital 9a (new)

(9a) Whereas Member States must, in accordance with Community law and with particular regard to Directives 95/46/EC¹ and 97/66/EC² of the European Parliament and the Council, lay down in their legislation that information society service-providers shall be able to provide all information of use in tracing and identifying providers of illegal content;

¹ OJ L 281, 23.11.1995, p. 31.

(Amendment 11)
Recital 11

(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 address the issue of consent by receivers to certain forms of unsolicited commercial communication and are fully applicable to Information Society services;

(11) Whereas the sending of unsolicited commercial communications by e-mail may be inconvenient for consumers and Internet service providers and may disrupt the smooth functioning of the Internet; whereas the question of consent by recipients of certain forms of unsolicited commercial communications is addressed in Directives 97/7/EC and 97/66/EC; whereas these directives establish a minimum standard of protection against the sending of unsolicited commercial communications by e-mail and are fully applicable to Information Society services; whereas these directives require as a minimum that unsolicited commercial communications by e-mail cannot be sent if the recipient objects to such a practice; whereas the setting up of industry filtering initiatives, such as Robinson lists, 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 costs for the recipient;


(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; 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;
Recital 16

(16) Whereas 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;

Recital 16a (new)

(16a) Whereas the directive on copyright in the Information Society should come into force within a time scale similar to that of this directive so as to ensure that the issue of liability of intermediaries for copyright infringements is addressed at Community level in a satisfactory manner;
(Amendment 16)
Recital 16b (new)

(16b) 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 rapidity and by 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, the Directive lays down the legal conditions to enable complaints to be lodged, both at law and otherwise, across borders and by electronic means;

(Amendment 17)
Recital 16c (new)

(16c) Whereas the definition of recipient of a service covers all types of usage of information society services, both by persons who provide information on the Internet and by persons who seek information on the Internet for private or professional reasons;

(Amendment 18)
Recital 16d (new)

(16d) Whereas the Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based;

(Amendment 19)
Recital 16e (new)

(16e) 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 must cooperate with a view to making laws and procedures compatible;
(16f) Whereas electronic commerce offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(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; whereas that derogation may cover only contractual obligations concerning contracts concluded by consumers which have not been harmonised at Community level.

(20a) Whereas cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries and the European Union's transatlantic partners.
(Recital 22) Whereas the adoption of this Directive will not prevent 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, and 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;

(Amendment 24) Recital 22a (new)

(22a) 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;

(Amendment 25) Recital 22b (new)

(22b) Whereas, 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 therefore be necessary to achieve at least 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;
(Amendment 26)
Recital 22c (new)

(22c) Whereas the protection of copyright and neighbouring rights is essential to the development of electronic transactions; whereas, in order to take account of the specific nature of such rights, Annex II to this Directive provides for a derogation from the "country of origin" clause;

(Amendment 27)
Recital 24a (new)


(Amendment 28)
Article 1(3)

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.

7923/99 sse/MM/lr EN
ANNEX DG F III 17
(Amendment 29)  
Article 2(a)  

(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.


(Amendment 30)  
Article 2(c)  

(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;

(Amendment 32)  
Article 2(fa) (new)  

(fa) "consumer": any natural person acting for purposes not related to his or her professional activity.
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:

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

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(Amendment 33)

Article 5(1), introduction

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:

2. Member States shall lay down in their legislation that, where 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.

(Amendment 34)

Article 5(2)

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:

2. Member States shall lay down in their legislation that, where 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.

(Amendment 37)

Article 6

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

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, 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.

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7923/99 sse/MM/lr EN
ANNEX DG F III 19
(Amendment 38)

Article 7

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

1. Member States shall lay down in their legislation that unsolicited commercial communication by e-mail must be identifiable as such.

2. Member States shall take measures to ensure that consumers can have themselves entered in an opt-out register, which service providers must check regularly.

3. In their legislation, Member States shall require service providers to inform their customers about data protection in accordance with Directives 95/46/EC and 97/66/EC.

(Amendment 39)

Article 8(1)

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.

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/legal professional privilege and fairness towards clients and other members of the profession are met.

(Amendment 40)

Article 9(3)

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

Deleted

(Amendment 42)

Article 11(1)

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:

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:
(Amendment 73)
Article 11(2)

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.

 LIABILITY OF INTERMEDIARIES

(Amendment 43)
Section 4, title

LIABILITY OF INTERMEDIARY SERVICE PROVIDERS

(Amendment 45)
Article 12(1)(ca) (new)

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.

(Amendment 46)
Article 12(2)

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 and that all necessary steps are taken to ensure that the information is not, during storage, accessible for persons other than the intended recipient.
(Amendment 47)
Article 13(d)

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

(Amendment 48)
Article 14(1)

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.

Access and hosting

1. Where an Information Society service is provided that consists in the provision of access to the communication network or 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 proceedings pursuant to Article 18, for the information rendered accessible or stored at the request of a recipient of the service, on condition that:

(a) the provider does not know, or was not in a position to know, that the activity is illegal;
(b) the provider, upon learning that an activity is illegal, acts immediately to remove or to disable access to the information;

(ba) the provider does not initiate the transmission and does not select or modify the information transmitted;
(bb) the provider shows that he has complied with the obligations imposed on him with regard to informing the party whose information is hosted about the requirement for him to comply with legislation, particularly on illegal content, non-pecuniary personal rights, copyright and other intellectual property rights.

(Amendment 49)
Article 14(2)

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

2. The provisions of this article shall not apply when the recipient of the service is acting under the authority or the control of the provider.
(Amendment 53)
Article 15(2), 2nd subparagraph (new)

Neither shall it affect any technically feasible and reasonable measures designed to prevent the use of illegally provided content.

(Amendment 54)
Article 15(2a) (new)

2a. Paragraph 1 applies under the condition that, in accordance with Community law - with particular regard to Directives 95/46/EC and 97/66/EC of the European Parliament and the Council -, the relevant operator takes all reasonably necessary steps to accommodate and not interfere with accepted industry standards used for the identification and protection of transmitted material.

(Amendment 55)
Article 16(1)(a)

(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;

(Amendment 56)
Article 16(1)(d)

(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.

(Amendment 57)
Article 16(1)(da) (new)

(da) 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.

2a. Member States shall, in their legislation, allow the effective use of notification and deletion procedures, including by means of appropriate electronic instruments.


2. Member States shall ensure that court actions as referred to in paragraph 1 are not inadmissible on the grounds that the complaint:

- is transmitted by electronic means, or

- is drafted in a Community language other than that of the Member State where the court is located.

Article 18a

Member States shall ensure that appropriate remedies are effectively available by adapting their procedures to contend with unlawful conduct and handle disputes on the Internet, and by providing access to such procedures on electronic networks.

(b) the field covered by Directive 95/46/EC of the European Parliament and of the Council;
(Amendment 63)
Article 22(1)(ca) (new)

(ca) television services as referred to in Directive 89/552/EEC, as last amended by Directive 97/36/EC, broadcasting services, services comparable to broadcasting.

(Amendment 64)
Article 22(3)(a)(i), 1st indent

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

(Amendment 65)
Article 24

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.

(Amendment 67)
Article 24, 2nd paragraph (new)

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;

(Amendment 68)
Annex II, 5th indent

- contractual obligations concerning consumer contracts;

- contractual obligations concerning consumer contracts which have not been harmonised at Community level.
The European Parliament,

having regard to the Commission proposal to Parliament and the Council (COM(98)0586 – 98/0325(COD)¹),

having regard to Articles 189b(2) (new Article 251(2)), 57, 66 and 100a (new Articles 47, 55 and 95) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C4-0020/99),

having regard to Rule 58 of its Rules of Procedure,

having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinions of 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 (A4-0248/99),

1. Approves the Commission proposal, subject to Parliament's amendments;

2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;

3. Calls on the Council to approve all Parliament's amendments and adopt the act as amended;

4. Points out that the Commission is required to submit to Parliament any modification it may intend to make to its proposal as amended by Parliament;

5. Instructs its President to forward this opinion to the Council and Commission.

¹ OJ C 30, 5.2.1999, p. 4.
CORRIGENDUM TO THE OUTCOME OF PROCEEDINGS

from: Working Party on Economic Questions (Information Society services)
dated: 11/12 November 1999
to: COREPER

No. prev. doc.: 12645/99 ECO 362 CONSOM 64 CODEC 651
No. Cion prop.: 5123/99 ECO 2 CODEC 6

Article 23, paragraph 1, 5th line

Should read as follows:

"Information Society services, in particular with respect to consumer protection and to the proper functioning of the Internal Market".
REPORT

from : Working Party on Economic Questions (Information Society services)
dated : 11/12 November 1999
to : COREPER

No. prev. doc.: 12645/99 ECO 362 CONSOM 64 CODEC 651
No. Cion prop.: 5123/99 ECO 2 CODEC 6


I. INTRODUCTION

1. On 18 November 1998 the Commission adopted a proposal for a Directive on certain legal aspects of electronic commerce which aims to remove barriers to the development of e-commerce in Europe and to establish a legal framework which will allow the sector to benefit from the advantages of the Internal Market.

2. The proposal essentially seeks to:

i) clarify the application of key Internal Market principles (the country of origin principle and the free movement of services) to Information Society services; and
ii) supplement the existing body of Community law with additional harmonisation of
certain specific legal aspects related to such services including:

- commercial communications (advertising, direct marketing, etc);
- the on-line conclusion of contracts;
- the liability of intermediaries;
- the enforcement and implementation of the legal framework.

These measures are intended to remove all legal obstacles resulting from divergent or
overlapping Member State legislation and thereby guarantee, in conjunction with the
existing *acquis*, the free movement of on-line services within the Community.

3. The European Parliament and the Economic and Social Committee delivered their
opinions on the proposal on 6 May 1999\(^1\) and 29 April 1999 respectively.

II. OUTCOME OF PROCEEDINGS

Much progress has been made since the progress report\(^2\) noted by the "Internal Market"

The text of the draft Directive resulting from the last discussion in the Working Party is
contained in document 12666/99. This text takes into account a number of the amendments
proposed by the European Parliament in its first reading. A systematic examination of these
amendments will take place before the Council.

At this stage several issues of principle remain unresolved, as well as a certain number of
specific points, as indicated in Sections III and IV below.

\(^1\) See doc. 7923/99 ECO 162 CODEC 234
\(^2\) See doc. 8891/99 ECO 215 CONSOM 42 CODEC 310.
III.  KEY ISSUES

A.  Scope of the Directive

The Commission has proposed a broad scope covering all legal requirements applicable to Information Society services. The limited number of exemptions listed in Article 1(4) cover taxation and data protection aspects and certain specific activities (notaries, representation of clients in court, gambling).

Delegations have generally supported this approach, however I has requested that financial services be excluded from the scope of the Directive or at least from the application of the Internal Market principles (Article 3), this latter option finding support from B and ES.

Other exclusions from the scope of the Directive have been requested for medical services and the advertisement of pharmaceuticals (A and NL), confidentiality services (A) and auditing (F).

B.  Application of Internal Market principles (Article 3 and Annex I)

The objective of Article 3(1) and (2) of the draft Directive is to ensure that Information Society services provided by a service provider established in a Member State are subject to the legal requirements of that Member State ("Member State of origin"), regardless of whether his services are limited to the territory of that Member State or are also received in other Member States. This means that the Member State of origin has to apply its national rules and a Member State of destination cannot restrict the free movement of Information Society services.

Two sorts of exemptions from these requirements are provided for:

- general exemptions found in Annex I of the text, in particular for intellectual and industrial property rights, certain specific financial services, and contractual obligations concerning consumers;
- case by case measures for reasons of 'public order', public health, public security and consumer protection found in Article 3(5).

Delegations initially took very different positions on this article with most delegations entering reserves. After extensive discussions in the Working Party, the issues still outstanding can be classified as follows:
1. **The relationship with International Private Law (IPL)**

A number of delegations (ES, GR, IRL, LUX, P and UK) favour the Commission's proposal, according to which only contractual obligations concerning consumer contracts are exempted from the Internal Market principles. This approach was not supported by A, B, DK, NL and S who took the view that, in the event of a conflict between this Directive and IPL, the latter should always prevail, and therefore proposed the addition of a provision indicating that Article 3 is without prejudice to IPL. D and FIN, for their part, support the application of IPL to deal with conflicts of law, but agree that the result should not restrict the free movement of services.

As a way forward on this question, the Presidency has sought to meet the various concerns expressed by adding further specific exemptions to Annex I covering the jurisdiction of courts, the free choice of law between parties to a contract, and real estate contracts subject to mandatory form requirements.

2. **Criminal law**

A, B, DK, I and NL have expressly requested that criminal law should be excluded from the scope of Article 3, by way of an additional exemption in Annex I or a restriction of the definition of "co-ordinated field" in Article 2(g).

Most delegations and the Commission oppose such a general exclusion.

As a compromise between these positions, the Presidency has reformulated the text of Article 3(5)(b) so as to effectively exempt criminal proceedings from the procedural conditions normally applicable to the Article 3(5) exemptions.

In this context it should be noted that A, I and NL have also proposed that Article 3, paragraphs 5(b), 6 and 7 be combined together to create a simplified procedure for case by case exemptions.
3. Community Directives prescribing minimum harmonisation

All delegations support the approach proposed by the Commission that this draft Directive applies cumulatively with Community directives in other fields, and that in areas, such as consumer protection, where only minimum harmonisation is prescribed, Member States remain free to establish stricter provisions in their national law and to apply these provisions to service providers established on their territory.

However, A, B, DK, I, NL and S remain concerned by the fact that Article 3 will restrict their ability to apply these stricter provisions to Information Society services provided from other Member States where a lower level of protection is in force, except in specific cases justifiable under the exemption in Article 3(5).

A and NL have therefore proposed that the final part of Article 1(3) "... insofar as this does not restrict the freedom to provide Information Society services", be replaced by "subject to their compatibility with the EC Treaty".

4. Other exemptions from Article 3

The following requests have also been made in relation to the exemptions in Annex I:

- F, with some sympathy from I, has proposed replacing the exemption for consumer contracts with a new substantive provision in Article 3 imposing the law of the country of destination as the applicable law;
- F and LUX have proposed deletion of the exemption covering provisions on the permissibility of unsolicited e-mail;
- D wishes to clarify that Article 3 does not prejudice competition (anti-trust) law, whilst I has requested an exemption for promotional competitions.

C. Liability of intermediary service providers

1. Knowledge Test

The Commission has proposed in Section 4 provisions limiting the liability of providers of three specific types of intermediary service: "mere conduit" (Article 12), "caching" (Article 13) and "hosting" (Article 14). As regards Article 14, service providers can only benefit from this limitation of liability where they do not have knowledge or awareness of illegal activity or information hosted.
Several delegations (A, DK, I, NL, and S in particular) supported the extension of such a knowledge test to Articles 12 and 13. The Presidency has sought to address this issue by the addition of a new paragraph 2bis in Article 15.

2. Monitoring obligations

Article 15 of the draft directive prohibits Member States from imposing general monitoring obligations on intermediary service providers. However, S has requested that the text leave open the possibility of such general monitoring for bulletin boards/chat forums etc., whilst F, for its part, wishes to oblige hosting service providers to maintain client lists and communicate such details to the judicial authorities.

D. Commercial Communication

The draft directive includes in Articles 6 to 8 some provisions harmonising commercial communication which are broadly acceptable to all delegations. However, DK, with some support, has proposed further harmonisation in the form of an article on 'good marketing behaviour', whilst D has suggested adding provisions modelled on those found in Article 10 of the TV without frontiers directive. In the absence of an agreement on such further harmonisation, D has proposed that all commercial communication be excluded from the scope of Article 3.

Delegations have agreed in principle on the desirability of further harmonisation in this area, although a majority and the Commission prefer to proceed in the context of the forthcoming revision of the directive on misleading advertising.

E. Comitology

The Commission proposal had included a number of provisions granting implementing powers for the Commission, together with a Consultative Committee. Discussions in the Working Party, however, revealed that the great majority of delegations were opposed to granting such powers to the Commission, and as a result the text of the draft directive does not contain any Comitology provisions, a situation which is acceptable to the Commission.
Five delegations (B, D, F, GR and I), whilst not wishing to grant executive powers to the Commission, nevertheless did not exclude the idea of including a "Contact Committee" or "Ad hoc Expert Group" to examine difficulties regarding the application of the country of origin provisions (Article 3(1)).

IV. OTHER POINTS

The following points relate to specific issues where one or more delegations maintain a reservation or scrutiny reservation:

1. **Article 1(5) (Culture)**: In response to a request from F, the Presidency has incorporated this new paragraph into the text.

2. **Article 2(a) (Employment Contracts)**: Following concerns from several delegations regarding the impact of Article 3 on employment relations, an addition has been made to Recital (3) (doc 12666/97 footnote 8). A, D, F and UK have scrutiny reserves on this addition.

3. **Article 3(5) (case-by-case derogations from Internal Market principles)**: A, B, and D wished to add "the protection of ones reputation/honour" to the list of grounds for exemption. Other delegations and the Cion, however, were opposed to any extension of the list, whilst IRL, for its part, wished to shorten it by deleting the reference to "consumer protection".

4. **Article 9 (Treatment of contracts)**: The following further exemptions from the principle established in Article 9(1) facilitating the use of electronic contracts were requested: employment contracts (D), consumer credit contracts (S), auctions of works of art (F). However, these requests have not been supported by other delegations.
5. **Article 11(1) (Placement of the order)**: In cases where a recipient of a service places his order through technological means, the service provider has to acknowledge the receipt without undue delay and by electronic means. Several delegations (F, IRL, NL, P and UK) suggested replacing "the receipt" with "his acceptance", while GR and NL also proposed adding a provision clarifying that, in the absence of an acknowledgement, no contract is concluded. Five delegations (A, D, DK, P and S) wished to delete all or part of the provision clarifying when the order and acknowledgement of receipt are deemed to be received.

6. **Articles 12-15 (Criminal liability)**: DK has a reserve on these articles regarding the appropriateness of the legal basis of this draft Community directive for provisions relating to criminal liability.

7. **Proposals for additional articles**: Whilst entering a reserve on Article 16(1)(e) (codes of conduct), D proposed the addition of a complete new article dealing with the protection of minors and incitement to hatred. IRL, for its part, entered a reserve on Article 23(2) (re-examination), preferring to add a specific Article 14bis dealing with the liability of information location services. These proposals were not supported by other delegations.

8. **Article 24 (Implementation)**: Several delegations (B, D, DK, NL and S) wanted more than the 18 months proposed by the Presidency for implementation into national law, whilst others (ES, F, FIN, GR, I, IRL, P, UK and the Cion) underlined the need for rapid transposition.
9. Other reserves and scrutiny reserves

The following are primarily drafting or linguistic points:

- Article 1(2) : scrutiny reserves from A and I;
- Article 1(4)(b) and accompanying recital : scrutiny reserves from F and P;
- Article 1(4)(c), first indent: reserves from A and D and a scrutiny reserve from B;
- Article 1(4)(c), second indent: reserves from A and D;
- Article 1(4)(c), third indent: B and LUX proposed that this indent be transferred to Annex I;
- Article 2(a) : reserves from A and D;
- Article 2(b) : scrutiny reserves from A;
- Article 2(c) and corresponding recital : scrutiny reserve from UK and reserve from ES;
- Article 2 (additional definition of 'intermediary') : scrutiny reserves from F, I and P;
- Article 2(d) : scrutiny reserves from A, D and NL;
- Article 2(fbis) : scrutiny reserves from B, D, F and I;
- Article 2(g) : scrutiny reserves from B, D, ES, F, I, P and S on this definition;
- Article 3(5), introductory sentence : scrutiny reserve from A;
- Article 5(1)(d) : scrutiny reserve from D;
- Article 6(c) and (d) : reserve from D;
- Article 7(2) : reserve from UK;
- Article 8 : scrutiny reserve from I on the whole article and A and D on paragraph 1;
- Recitals relating to Article 9 : scrutiny reserves from DK, F and NL;
- Article 10 : reserve from F on this article;
- Article 11(4) : scrutiny reserves from D and F;
- Articles 12 and 13: NL proposed that these be merged;
- Article 13(1) : scrutiny reserves from A, D and P;
- Article 14(1)(b) : scrutiny reserve from D;
- Recital relating to Article 14(3) : scrutiny reserve from F;
- Article 15(1) : scrutiny reserve from LUX;
- Article 15(2bis) : reserves from D, UK and the Cion;
- Recital relating to Article 15: scrutiny reserves from IRL and UK;
- Article 17 : scrutiny reserve from LUX;
- Article 19(1) : scrutiny reserve from UK;
- Article 19(4) : scrutiny reserve from A;
- Article 23(1) : reserves from A and D;
- Annex I, third indent : reserve from P;
COUNCIL OF
THE EUROPEAN UNION

Brussels, 23 November 1999

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ECO 387
CONSM 73
CODEC 714

EXTRACT OF THE SUMMARY RECORD
of: 1853rd meeting of the PERMANENT REPRESENTATIVES COMMITTEE
on: 17 and 19 November 1999
at: Brussels

ITEM 19: Preparation of the "Internal Market" Council on 7 December 1999

   – political agreement

On the basis of the Report to COREPER (document 12667/99) and the draft text of the Directive (12666/99), the Committee undertook a first in-depth examination of this dossier, focusing on the key issues identified in Section III of the Report, the results of which are as follows: ¹

¹ D maintained a formal waiting reserve of a linguistic nature on the text of the directive.
1. **Scope of the Directive**

Delegations in general supported a broad scope with exemptions kept to a minimum.

I maintained its request that financial services be excluded at least from the application of the Internal Market principles (Article 3), a proposal finding support from B and ES.

Other exclusions were requested for medical services (A and NL), the advertisement of pharmaceuticals (NL), lawyers and confidentiality services (A). These delegations could broadly accept that these derogations be included in Annex I. B and LUX suggested the exemption for gambling activities also be moved to Annex I. F, for its part, expressed a wish for clarification in a recital regarding auditing.

2. **Application of Internal Market Principles**

(a) **The relationship with International Private Law**

A majority could broadly support the Presidency text, although a group of delegations (B, I and NL in particular) continued to propose a new provision stating that the Directive was without prejudice to International Private Law.

However, on the basis of the following two statements from the Chair:

- the Directive did not establish specific rules of International Private Law;
- the applicable law determined by International Private Law was not allowed to restrict the freedom to provide Information Society services;

delegations agreed to explore the potential for a compromise agreement.

F maintained its request to replace the consumer contract exemption in Annex I with a substantive provision establishing the law of the country of destination as the applicable law. I suggested dealing with this issue by way of a recital.
b) **Criminal law**

A, B, DK and NL continued to request that criminal law be excluded from the scope of Article 3. S, for its part, wished to exclude criminal matters as regards Articles 12 to 15. Several of these delegations queried the legal basis of including criminal matters.

I, who had similar concerns, nevertheless positively welcomed a compromise text suggested by UK, widening the scope of Article 3(5), and suggested an accompanying recital.

c) **Community Directives prescribing minimum harmonisation**

A, B, DK, I and NL remained concerned by the fact that Article 3 would restrict their ability to apply stricter consumer protection provisions to Information Society services provided from other Member States where a lower level of protection was in force and therefore proposed that the final part of Article 1(3) "... insofar as this does not restrict the freedom to provide Information Society services", be replaced by "subject to their compatibility with the EC Treaty".

Most other delegations and the Cion opposed this modification.

3. **Liability of intermediary service providers**

a) **Knowledge Test**

Most delegations supported the Presidency compromise which addressed this issue by the addition of a new paragraph 2bis in Article 15. Nevertheless, A, B, DK, NL and S continued to support the extension of the knowledge test to Articles 12 and 13.
b) Monitoring obligations

S maintained its request that Article 15 leave open the possibility of general monitoring for bulletin boards/chat forums etc. F, for its part, continued to propose an addition to Article 14 which obliged hosting service providers to maintain client lists and communicate such details to the judicial authorities. A number of delegations could support the inclusion of an optional provision of this nature.

UK maintained its scrutiny reserve on Article 15(2bis), whilst IRL continued to propose an additional article on search engines.

4. Commercial Communication

A, B, D, DK and S continued to propose further harmonisation in this area, which D saw as necessary if it were to withdraw its request for an exemption for all commercial communication from the scope of Article 3.

All other delegations and the Cion opposed further harmonisation in the context of this directive, whilst F and LUX recalled their request to delete the exemption for unsolicited e-mail from Annex I.

5. Comitology

The Committee agreed that the Directive should not contain comitology provisions.

* * *

The Committee mandated the attachés to examine the first reading amendments of the European Parliament, together with the specific points set out in Section IV of document 12667/99, with a view to facilitating the re-examination of this draft Directive at a forthcoming meeting of the Committee.
As mandated by COREPER, the Counsellors, at their meeting on 23 November 1999, examined the first reading amendments of the European Parliament together with the specific points set out in Section IV of document 12667/99.

1. European Parliament First Reading Amendments

The Working Party was able to accept 15 amendments in their entirety and 18 amendments in principle or in a modified form. 22 amendments were rejected, whilst 5 were left open pending agreement on the central questions still unresolved regarding the text. These decisions are in any case without prejudice to the ongoing discussions in COREPER on this draft Directive.

The following amendments were accepted: Nos 1, 2, 4, 5, 6, 7, 13, 18, 24, 40, 43, 55, 56, 57 and 62.
The following amendments were accepted in principle or in a modified form: Nos 3, 11, 12, 14, 15, 16, 17, 19, 20, 22, 23, 29, 32, 33, 34, 37, 38 and 67.

The following amendments were rejected: Nos 8, 10, 21, 26, 27, 28, 30, 39, 45, 46, 47, 48, 49, 53, 54, 58, 59, 60, 61, 63, 65 and 68.

Consideration of the following amendments was left open: Nos 9, 25, 42, 64 and 73.

2. Points set out in Section IV of document 12667/99

The Counsellors were successful in considerably reducing the number of outstanding reserves. The current situation in relation to these points is as follows:

- Article 1(5) (Culture) : This new paragraph has been agreed unanimously.

- Article 2(a) (Employment Contracts) : The addition made to Recital (3) (doc 12666/97 footnote 8) has been agreed unanimously.

- Article 3(5) (case-by-case derogations from Internal Market principles) : A, B, D and NL maintain their request to add "the protection of ones reputation/honour" to the list of grounds for exemption. Other delegations and the Cion, however, continue to oppose to any extension of the list, whilst IRL, for its part, wishes to shorten it by deleting the reference to "consumer protection".

- Article 9 (Treatment of contracts) : Requests for the following further exemptions from the principle established in Article 9(1) facilitating the use of electronic contracts were maintained: employment contracts (D), consumer credit contracts (S).

The reserve from F regarding auctions of works of art has been lifted following the agreement of delegations to add the recital set out below:

"Whereas the co-ordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art;" (to be added at the end of recital 10)."
- **Article 11(1) (Placement of the order)**: In cases where a recipient of a service places his order through technological means, the service provider has to acknowledge the receipt without undue delay and by electronic means. P continues to suggest replacing "the receipt" with "his acceptance", whilst five delegations (A, D, DK, P and S) maintain their request to delete all or part of the provision clarifying when the order and acknowledgement of receipt are deemed to be received.

- **Articles 12-15 (Criminal liability)**: DK and NL maintain a reserve on these articles regarding the appropriateness of the legal basis of this draft Community directive for provisions relating to criminal liability. (It should be noted that this point is linked to the request to exclude criminal law from the scope of the Internal Market principles).

- **Proposals for additional articles**: D maintains its reserve on Article 16(1)(e) (codes of conduct) and continues to prefer the addition of a complete new article dealing with the protection of minors and incitement to hatred. IRL maintains its reserve on Article 23(2) (re-examination), preferring, with some sympathy from F, to add a specific Article 14bis dealing with the liability of information location services.

- **Article 24 (Implementation)**: Several delegations (B, D, DK, NL and S) want more than the 18 months proposed by the Presidency for implementation into national law, whilst others (ES, F, FIN, GR, I, IRL, P, UK and the Cion) underline the need for rapid transposition.
Other reserves and scrutiny reserves

The following other reserves are maintained:

- Recital relating to Article 1(1) : scrutiny reserve from F;
- Article 1(4)(c), first indent: reserves from A and D;
- Article 1(4)(c), second indent: reserves from A and D;
- Article 1(4)(c), third indent: B and LUX proposed that this indent be transferred to Annex I;
- Article 1(5) (additional provision regarding financial services): proposal from B;
- Article 2 (additional definition of 'intermediary') : scrutiny reserves from P;
- Article 2(fbis) : scrutiny reserves from D;
- Article 2(g) : scrutiny reserves from B, D, ES, F, IP and S on this definition;
- Article 6(c) and (d) : reserve from D;
- Article 7(2) : reserve from UK;
- Article 8 : scrutiny reserve from I;
- Recitals relating to Article 9 : scrutiny reserves from F and NL;
- Article 10(1) : reserve from B and F;
- Article 10(3) and 11(4) : reserve from F;
- Article 11(4) : scrutiny reserve from A;
- Article 13(1) : scrutiny reserve from P;
- Article 15(2bis) : reserves from B and UK;
- Article 18 : scrutiny reserve from F;
- Annex I, third indent: reserve from P.
Delegations will find attached in Appendix I the text of the above-mentioned draft Directive including the compromise solutions envisaged by COREPER.

Appendix II contains a number of declarations to the Council minutes which also form part of the compromise package.

The remaining reserves of delegations and the Commission are set out in the Report from COREPER to COUNCIL (doc. 13657/99 ECO 403 CONSOM 77 CODEC 750).
APPENDIX I

Draft
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on certain legal aspects of Information Society services,
in particular electronic commerce, in the Internal Market.
"Directive on electronic commerce"¹

CHAPTER I
GENERAL PROVISIONS

Article 1
Objective and scope²

1. This Directive seeks to contribute to the proper functioning of the Internal Market by ensuring the free movement of Information Society services between the Member States ³.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on Information Society services relating to the Internal Market, 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.

¹ It should be noted that the recitals will be finalised in their entirety after the Council.
² New recital agreed:
"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; whereas this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression."
³ New recital agreed :
"Whereas the objective of this Directive is to create a legal framework to ensure the free movement of Information Society services between Member States and not to harmonise the field of criminal law as such;".
3. This Directive complements Community law applicable to Information Society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them insofar as this does not restrict the freedom to provide Information Society services.

3bis This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

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Reformulation of Recital 14 agreed:
"Whereas this Directive complements information requirements established by the above-mentioned Directives and in particular Directive 97/7/EC on the protection of consumers in respect of distance contracts".
4. This Directive shall not apply to:

(a) the field of taxation,

(b) questions relating to Information Society services covered by Directives 95/46/EC of the European Parliament and the Council and 97/66/EC of the European Parliament and the Council,

(b bis) questions relating to agreements or practices governed by cartel law.

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5 New recital agreed: "Whereas this Directive does not aim to establish rules on fiscal obligations; whereas this Directive does not pre-empt the elaboration of Community instruments concerning fiscal aspects of electronic commerce;".

6 New recital agreed: "Whereas the protection of individuals with regard to the processing of personal data is solely governed by European Parliament and Council Directives 95/46/EC and 97/66/EC which are fully applicable to Information Society services; whereas these Directives already establish a 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 personal data between Member States; whereas the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; whereas this Directive cannot prevent the anonymous use of open networks such as the Internet;".
the following activities of Information Society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority;
- the representation of a client and defence of his interests before the courts;
- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

5. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

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7 New recital agreed:
"Whereas the exclusion of gambling activities from the scope of application of this directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; whereas this does not cover promotional competitions where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services;".
Article 2
Definitions

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


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

\(^8\) New recital agreed: "Whereas the definition of Information Society services already exists in Community law in the European Parliament and Council Directive 98/48/EC and in the European Parliament and Council Directive 98/84/EC; whereas this definition covers any service normally provided for remuneration, at a distance, 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 98/48 which do not imply data processing and storage are not covered by this definition;".

\(^9\) Reformulation of Recital 3 agreed:
"Whereas Information Society services span a wide range of economic activities which take place on-line; whereas these activities can, in particular, consist of selling goods on-line; whereas activities such as the delivery of goods as such or the provision of services off-line are not covered; whereas Information Society services 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 services consisting of the transmission of 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 Directive 89/552 and radio broadcasting are not Information Society services because they are not provided at individual request; whereas by contrast services which are transmitted point to point, such as video on demand or the provision of commercial communications by e-mail are Information Society services; whereas the use of e-mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an Information Society service; whereas the contractual relationship between an employee and his employer is not an Information Society service. Whereas activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not Information Society services".
(c) "established service provider"¹⁰: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, 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) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;

¹⁰ Reformulation of Recital 9 agreed: "Whereas the place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; whereas this requirement is also fulfilled where a company is constituted for a given period; 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 but the place where it pursues its economic activity; whereas in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; whereas in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service;".
"commercial communication": 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 in themselves 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, particularly when this is without financial consideration.


"coordinated field": requirements laid down in Member States' legal systems applicable to Information Society service providers or Information Society services, regardless of whether they are of a general nature or specifically designed for them.

- The co-ordinated field concerns requirements with which the service provider has to comply in respect of:

  - the taking up of the activity of an Information Society service, such as requirements concerning qualifications, authorisation or notification schemes;

  - the pursuit of the activity of an Information Society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.
The co-ordinated field does not cover requirements such as:
- requirements applicable to goods as such,
- requirements applicable to the delivery of goods,
- requirements applicable to services not provided by electronic means.\(^{11}\)

**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 the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide Information Society services from another Member State\(^ {12} \).

3. [...]

4. Paragraph 1 and 2 shall not apply to the fields referred to in Annex 1.

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\(^{11}\) New recital agreed: "Whereas the scope of the co-ordinated field is without prejudice to future Community harmonisation relating to Information Society services and to future legislation adopted at national level in accordance with Community law; whereas the co-ordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member State's legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member State's requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; Whereas the co-ordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art;".

\(^{12}\) New recital: "Whereas the Court of Justice has constantly held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State."

\(^{13}\) Reformulation of Recital 7 agreed:"Whereas the present Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; whereas provisions of the applicable law designated by rules of private international law shall not restrict the freedom to provide Information Society services as established in this Directive;".

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5. Member States may take measures to derogate from paragraph 2 in respect of a given Information Society service if the following conditions are fulfilled:

(a) the measures shall be:

   (i) necessary for one of the following reasons:

       - public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality,
       - the protection of public health,
       - public security, including the safeguarding of national security and defence,
       - the protection of consumers, including investors 14;

   (ii) taken against a given 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 and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, 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 they were inadequate;
   - notified the Commission and the Member State referred to in Article 3(1) of its intention to take such measures.

14 New recital agreed:
"Whereas this Directive, together with Directive ../../EC concerning the distance marketing of consumer financial services, contributes to the creation of a legal framework for the on-line provision of financial services; whereas this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; whereas the possibility for Member States, established in this Directive, under certain circumstances to restrict the freedom to provide Information Society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors;".
6. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 5 point (b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in Article 3(1), indicating the reasons for which the Member State considers that there is urgency.

7. Without prejudice to Member State's possibility to proceed with the measures in question, the Commission has to examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.
CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an Information Society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.\textsuperscript{15}

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 the Council.

Article 5

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

   \begin{itemize}
   \item[(a)] the name of the service provider;
   \item[(b)] the geographic address at which the service provider is established;
   \item[(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;
   \item[(d)] where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
   \end{itemize}

\textsuperscript{15} New recital agreed:
"Whereas the Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC consisting of the physical delivery of a printed e-mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification services;".
(e) where the activity is subject to an authorisation scheme the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:
   - any professional body or similar institution with which the service provider is registered;
   - the professional title and the Member State where it has been granted;
   - a reference to the applicable professional rules in the Member State of establishment and the means to access them[...];

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Council Directive 77/388/EEC as amended by the Council Directive 80/98/EC.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where Information Society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2 Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of or constitute an Information Society service shall comply at least 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 permitted in the Member State where 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 clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.
**Article 7**

**Unsolicited commercial communication**

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously 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. 16

**Article 8**

**Regulated professions** 17

1. Member States shall ensure that the use of commercial communications which are part of or constitute an Information Society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, 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 commercial communication in conformity with the rules referred to in paragraph 1.

3. When elaborating [...] proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close co-operation with the relevant professional associations and bodies.

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16 New recital agreed: "Whereas Member States who allow the sending of unsolicited commercial communication by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt out registers in which natural persons not wishing to receive such commercial communications can register themselves;".

17 New recital: "Whereas this Directive complements Community law and national law relating to regulated professions;".
Section 3  Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process do not create obstacles for the use of electronic contracts or result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) [...];

(d) contracts of suretyship granted and collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(e) contracts governed by family law or by the law of succession.

18 New recitals agreed:
" Whereas this Directive does not affect Member States' possibility to maintain or establish general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures;"
" Whereas Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; whereas this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have effects with regard to third parties; whereas this possibility covers also contracts requiring certification or attestation by a notary;"
" Whereas Member States' obligation to remove obstacles for the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility to use electronic means in certain cases;"
" Whereas Member States' obligation to remove obstacles for the use of electronic contracts shall be implemented in conformity with legal requirements for contracts enshrined in Community law;"

19 New recital agreed:
" Whereas Member States may maintain restrictions for the use of electronic contracts with regard to contract requiring by law the involvement of courts, public authorities, or professions exercising public authority; whereas this possibility covers also contracts requiring by law certification or attestation by a notary;"
3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every 5 years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the categories referred to in paragraphs 2 (b) [...] to which they do not apply paragraph 1.

Article 10

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;
(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;
(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

2a. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

3. Article 10 (1) and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.\(^{20}\)

\(^{20}\) New recital agreed:

"Whereas the exceptions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by the present Directive, in relation to information to be provided and the placement of orders, should not enable, as a result, the bypassing of those provisions by providers of information society services".
Article 11
Placement of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where a recipient of a service [...] places his order through technological means, the following principles apply:
   - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means
   - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors [...], prior to the placing of the order.

3. [...]

4. Article 11(1) first indent and (2) are not applicable to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.
Section 4  Liability of intermediary service providers

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 a recipient of the service, or the provision of access to a communication network, Member States shall provide in their legislation that the service provider shall not be liable 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.

21 New recital agreed:
"Whereas the limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; whereas such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it."

22 New recitals agreed:
"Whereas a service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; whereas this requires among other things that he does not modify the information that he transmits; whereas this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission;"
"Whereas a service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities."
3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

Article 13

Caching

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall provide in their legislation that the service provider shall not be liable 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 widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.
Article 14
Hosting

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

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

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.23

23 New recital agreed:
"Whereas, in order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; whereas the removal or disabling of access has to be undertaken in the respect of the principle of freedom of expression;".
Article 15
No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12 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. [...]  

2bis Member States may establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities or information undertaken by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.  

24 New recital agreed:
"Whereas Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; whereas this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation;".

24
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, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;
   (b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;
   (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. Member States and the Commission shall encourage the involvement of associations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up according to point (a) of paragraph 1. Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

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 the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

25 New recital agreed:
"Whereas Member States and the Commission shall encourage the drawing-up of codes of conduct; whereas this shall not impair the voluntary nature of such codes and the possibility for interested parties to freely decide whether to adhere to such codes;".

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2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant 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 [...] court actions available under national law concerning Information Society services’ activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. In the annex of Directive 98/27/EC the following point 11 is added:
   - Directive …./…./EC on certain legal aspects on Information Society services, in particular electronic commerce, in the Internal Market.  

**Article 19**

**Cooperation**

1. Member States shall [...] have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall [...] cooperate with [...] other Member States; they shall, to that end, appoint one or several contact points, whose coordinates they shall communicate to the other Member States and to the Commission.

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26 New recital agreed:
"Whereas Directive 98/27/EC, which is applicable to Information Society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; whereas this mechanism will contribute to the free movement of Information Society services by ensuring a high level of consumer protection."
3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by [...] other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms

(b) obtain the particulars of authorities, associations or organisations from which they may obtain further information or practical assistance.

(c) [...] 

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

6. [...] 

7. [...] 

Article 20
Electronic media

[...] 

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. 27

27 New recital agreed: "Whereas the sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; whereas Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive;".
CHAPTER IV
[...] FINAL PROVISIONS
Article 22
[...]

Article 23
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, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of Information Society services, in particular with respect to the protection of minors, consumer protection and to the proper functioning of the Internal Market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments.

Article 24
Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within [...] 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 25
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 26
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

Derogations from Article 3

As referred to in Article 3(4), Article 3(1) and (2) do not apply to:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC and Directive 96/9/EC 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;
- Article 44 paragraph 2 of Directive 85/611/EEC;
- the freedom of the parties to choose the law applicable to their contract;
- contractual obligations concerning consumer contracts;
- formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated;
- the permissibility of unsolicited commercial communications by electronic mail [...].

_____________________

28 New recital agreed:
"Whereas the present Directive does not affect the law applicable to contractual obligations relating to consumer contracts; whereas accordingly this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence;". 
Declarations to be included in the Council's minutes as a part of the compromise package

1. Joint Commission and Council declaration on commercial communications

"The Council and the Commission recognise the importance of and the need for further initiatives with respect to rules regarding businesses' market behaviour in order to ensure an adequate level of consumer protection within the Internal Market. Further initiatives or rules regarding market behaviour will contribute to a more predictable legal framework and avoid risks of unfair competition between business established in different Member States.

The Council and the Commission recognise that consumer confidence in Information Society Services is a prerequisite for the positive development of e-commerce. The Commission will propose within one year after the adoption of this Directive adequate further initiatives concerning businesses' market behaviour within the framework of its Internal Market policy on commercial communications".

2. Council declaration on consumer confidence

"The Council recalls its resolution of 19 January 1999 in which it considers that, in order to develop consumer confidence in Information Society services and to promote the development of electronic commerce, consumers should, within the framework of Community law and of the Brussels and Rome Conventions, be able to benefit from the protection afforded by the legislation of their country of habitual residence and to have easy access to redress procedures, in particular within their country of habitual residence."

3. Council declaration on protection of minors

"The Council considers the protection of minors and human dignity in connection with information provided or transmitted by Information Society services as a matter of great importance. The Council recalls its recommendation 98/560/EC aiming at achieving a comparable and effective level of protection of minors and human dignity and European and Council Decision 276/1999/EC adopting a multi-annual Community action plan on safer use of the Internet. The Council recalls the importance of having regular reports on the effectiveness of this Community policy, accompanied, where necessary, by new proposals."
I. INTRODUCTION

1. On 18 November 1998 the Commission adopted a proposal for a Directive on certain legal aspects of electronic commerce which aims to remove barriers to the development of e-commerce in Europe and to establish a legal framework which will allow the sector to benefit from the advantages of the Internal Market.

2. The proposal essentially seeks to:

   i) clarify the application of key Internal Market principles (the country of origin principle and the free movement of services) to Information Society services; and
ii) supplement the existing body of Community law with additional harmonisation of certain specific legal aspects related to such services including:

- commercial communications (advertising, direct marketing, etc);
- the on-line conclusion of contracts;
- the liability of intermediaries;
- the enforcement and implementation of the legal framework.

These measures are intended to remove all legal obstacles resulting from divergent or overlapping Member State legislation and thereby guarantee, in conjunction with the existing acquis, the free movement of on-line services within the Community.

3. The European Parliament and the Economic and Social Committee delivered their opinions on the proposal on 6 May 1999\(^1\) and 29 April 1999 respectively.

II. OUTCOME OF PROCEEDINGS

Considerable advances have been made since the progress report\(^2\) noted by the "Internal Market" Council of 21 June 1999.

The text of the draft Directive resulting from the last debate in COREPER is contained in document 13655/99. This text in particular takes into account a number of the amendments proposed by the European Parliament in its first reading, and many further European Parliament amendments relating to the recitals are also acceptable in principle.\(^3\)

A number of problems were resolved at COREPER level, although certain other issues remain outstanding. These issues are set out, together with positions of delegations, in Section III. There are also a number of specific points which remain unresolved which are set out in Section IV.

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\(^1\) See doc. 7923/99 ECO 162 CODEC 234.
\(^2\) See doc. 8891/99 ECO 215 CONSOM 42 CODEC 310.
\(^3\) The following amendments, as indicated in doc. 7923/99, were accepted: nos. 1, 2, 4, 5, 6, 7, 13, 18, 24, 40, 43, 55, 56, 57 and 62. The following amendments were accepted in principle in a modified form: nos. 3, 11, 12, 14, 15, 16, 17, 19, 20, 22, 23, 29, 32, 33, 34, 37, 38, and 67 (see doc. 13369/99 ECO 390 CONSOM 74 CODEC 727).
III. KEY ISSUES

A. Inclusion of Financial Services

The Commission proposed that only certain specific financial services should benefit from an exemption from the Internal Market Principles established in Article 3 of the text. (These exemptions are contained in Annex I of the draft Directive). Delegations generally supported this approach. However I, with support from B and ES, requested that financial services be excluded in their entirety. P had also supported some extensions to the Annex I exemptions.

The compromise solution formulated by COREPER does not extend the general exemptions from Annex I, but adds a provision to the "case by case" exemptions envisaged in Article 3(5)(i), 4th indent of the text which reads "the protection of consumers including investors".

Most delegations have signalled their willingness to accept this solution as part of the overall compromise package. Nevertheless B, I, P, S and UK have maintained scrutiny reserves. IRL, for its part, has maintained its request for the fourth indent of Article 3(5)(i) to be deleted.

B. The Relationship of the Internal Market principles (Article 3 and Annex I) with International Private Law (IPL)

The objective of Article 3(1) and (2) of the draft Directive is to ensure that Information Society services provided by a service provider established in a Member State are subject to the legal requirements of that Member State ("Member State of origin"), regardless of whether his services are limited to the territory of that Member State or are also received in other Member States. This means that the Member State of origin has to apply its national rules and a Member State of destination cannot restrict the free movement of Information Society services. A number of delegations had expressed concern about the relationship of these principles with existing rules of international private law concerning conflicts of law and jurisdiction.

The compromise elaborated by COREPER is based around the new paragraph 3bis included in Article 1, the reformulated recital 7 set out in footnote 13of doc. 13655/99 and the second declaration to the Council Minutes found in Appendix II of the same document. The deletion of the fifth indent of Annex I and reformulation of the sixth indent also form part of the compromise on this question.
Most delegations reacted positively to this solution in the context of an overall compromise, but nevertheless a number of reserves remain concerning the second half of Recital 7. A and NL are opposed to the phrase at the end of the sentence "as established in this Directive", preferring a simple reference to the EC Treaty, whilst B, for its part, maintained a scrutiny reserve on this point. GR, IRL and LUX on the other hand, are concerned that an additional more general reference to "provisions of private international law" which had figured in an earlier version of the text has now been deleted. DK and UK entered scrutiny reserves regarding the Council declaration.

C. Criminal Law Aspects

A number of delegations have expressed concerns about the impact of this draft Directive (and in particular Articles 12-15 on the liability of intermediaries) on some areas of criminal law. This point is linked to the issues considered under point F.

The solution retained by COREPER has been to widen the justifications for Member State measures taken under Article 3(5) and to make it clear in the text that the procedural condition for such measures do not apply to acts carried out in the framework of a criminal investigation. This is accompanied by a new recital (footnote 3) explaining that the Directive does not seek to harmonise the field of criminal law as such.

The compromise is acceptable to most delegations as part of the overall package, although reserves have been maintained by B, who prefers to see a clear exclusion of all criminal matters, and A, who wishes to add a further element to the recital.

DK has a particular problem regarding the legal basis of the draft Directive, and proposed a statement by the Representatives of Governments of the Member States (based on that which accompanies the Money Laundering Directive) according to which they undertake to align their criminal legislation with the substantive principles of the Directive.

Such a statement was considered unnecessary and inappropriate by the Council Legal Service and the Cion, and was opposed by many delegations. In the absence of agreement on its proposal, DK maintained its reserve on the Directive, whilst the Presidency invited DK to consider a unilateral declaration.
D. Protection of dignity/honour

D, supported by A, B, NL and P, have requested, as an additional basis for the case-by-case exemptions in Article 3(5(i), the insertion of an indent referring to "the protection of ones dignity/honour". For D this is an important constitutional question. Other delegations (notably F, LUX and UK) and the Cion considered that a new indent was not justified but that some of the concerns of the D delegation could be covered by the existing Article 3(5(i), first indent, which refers to incitement to hatred on grounds of race, sex, religion or nationality.

E. Community Directives prescribing minimum harmonisation

All delegations support the approach proposed by the Commission that this draft Directive applies cumulatively with Community directives in other fields, and that in areas, such as consumer protection, where only minimum harmonisation is prescribed, Member States remain free to establish stricter provisions in their national law and to apply these provisions to service providers established on their territory.

However, A, B, DK, I, and NL remain concerned by the fact that Article 3 will restrict their ability to apply these stricter provisions to Information Society services provided from other Member States where a lower level of protection is in force, except in specific cases justifiable under the exemption in Article 3(5). These delegations therefore maintain reserves on the current formulation of Article 1(3).

F. Liability of intermediary service providers

1. Knowledge Test

The Commission has proposed in Section 4 provisions limiting the liability of providers of three specific types of intermediary service: "mere conduit" (Article 12), "caching" (Article 13) and "hosting" (Article 14). As regards Article 14, service providers can only benefit from this limitation of liability where they do not have knowledge or awareness of illegal activity or information hosted.

Several delegations (A, B, DK, NL and S) had supported the extension of such a knowledge test to Articles 12 and 13.
Following discussions at COREPER it emerged that the problem related, at least in part, to the potential of future technological developments to permit intermediaries to monitor the data they transmit, and that with this ability, an exemption from liability might no longer be appropriate. With this in mind the Presidency has proposed an addition to Article 23(2)(revision clause) with a view to helping the above delegations to lift their reserves on this question.

2. Monitoring obligations

Article 15 of the draft directive prohibits Member States from imposing general monitoring obligations on intermediary service providers. However, S has requested that the text leave open the possibility of such general monitoring for bulletin boards/chat forums etc., so as to allow current Swedish law in this area to remain unaffected. The Presidency, following the advice of the Cion that in any case the draft Directive would not require S to change its law, promised to reflect upon the wording of a recital which could be inserted to clarify further the impact of Article 15.

On related issues, P has a reserve on the recital relating to Article 14 contained in footnote 23, whilst UK also maintains a reserve on Article 15(2bis).

G. Commercial Communication

The draft directive includes in Articles 6 to 8 some provisions harmonising commercial communication which are broadly acceptable to all delegations. However, DK, with some support from B, D and NL, had proposed further harmonisation in the form of an article on 'good marketing behaviour'.

Delegations have agreed in principle on the desirability of further action in this area, although a majority and the Commission prefer to proceed in the context of commercial communication policy.
Given these views, COREPER has prepared a compromise in the form of the Joint Commission and Council declaration included in Appendix II. Delegations have reacted positively to this initiative, although on the formulation D, DK, GR and UK have entered reserves and F and the Cion scrutiny reserves.

IV. OTHER POINTS

The following points relate to specific issues where one or more delegations maintain a reservation or scrutiny reservation:

1. Regulated Professions

D has proposed the addition of a paragraph in Article 3 to indicate that the application of the Internal Market principles are "without prejudice to national provisions conforming to Community regulations governing regulated activities". A, for its part, has requested that the general exemptions in Article 1(4)(c), second indent, also cover representation of clients before public authorities and legal advice by non-authorised lawyers.

The Presidency has proposed a recital (footnote 17 of doc. 13655/99) to address these concerns, but both delegations have maintained their reserves.

2. Unsolicited e-mail

F, IRL and LUX have reserves regarding the inclusion of the exemption covering provisions on the permissibility of unsolicited e-mail from the list of exemptions to the Internal Market Principles included in Annex I.

3. Application of the "case-by-case" exemption to civil proceedings

A and NL have asked for clarification in a recital that the "case by case" exemptions to the Internal Market principles contained in Article 3(5) may also be applicable to civil court proceedings. The Presidency and the Cion have undertaken to reflect upon how this may be made clear in the text.
4. **Article 10(1) - Information obligations**

F, supported by B, have a reserve on the list of information contained in Article 10(1), which they request be supplemented by the items listed in the distance selling directive.

5. **Medical Services**

NL has a reserve on the inclusion of medical services within the scope of the Directive.

6. **Implementation Date**

Several delegations (B, D, DK, NL and S) want more than the 18 months proposed by the Presidency for implementation into national law, whilst others (ES, F, FIN, GR, I, IRL, P, UK and the Cion) underline the need for rapid transposition.

7. **Scrutiny reserves on drafting points:**

- Recital 3 (footnote 9): IRL
- Article 2(g): I, P and S
- Article 8: I
- Recital (footnote 20): GR, I, IRL and UK.
Page 13, paragraph (g), last line

Should read as follows:

"amended by the Council Directive 98/80/EC".
COUNCIL OF THE EUROPEAN UNION

Brussels, 12 January 2000

13858/99

LIMITE

PV/CONS  83
MI  126

DRAFT MINUTES ¹

Subject: 2233rd Council meeting (Internal Market), held in Brussels, on 7 December 1999

¹ Information on the final adoption of Council acts which may be released to the public may be found in Addendum 1 to these minutes.
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13858/99

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DG C II
1. **Adoption of the agenda**  
13713/99 OJ/CONS 83 MI 124

The Council adopted the above-mentioned agenda.

2. **Approval of the list of "A" items**  
13714/99 PTS A 68

The Council approved the “A” items as listed in 13714/99 PTS A 68.  
Information concerning item 2 on the list is given in Addendum 1 to these minutes.

3. **Strategy for the internal market**  
- Oral presentation by the Commission  
- Exchange of views

The Council welcomed the presentation of the Commission's Strategy for the internal market.  
It particularly welcomed the development of a timetable of specific target actions to ensure delivery of strategic and operational objectives. The Council commended the strategy to the European Council meeting in Helsinki and agreed to return to the subject, for a first interim review, at its meeting on 25 May 2000.

4. **Joint Work Programme of the three Presidencies (FIN, P, F)**  
- Progress report  
- Exchange of views  
12928/99 MI 115  
+ COR 1 (en)

The Council welcomed the Joint Work Programme of the Finnish, Portuguese and French Presidencies, endorsing the broad priorities and general direction of work outlined in the document.
5. **Scoreboard (new version)**
- Oral presentation by the Commission
- Exchange of views

The **Council** welcomed the Commission's presentation of the latest version of the Single Market Scoreboard and expressed strong support for its continued use as an instrument for monitoring progress in improving the performance of the internal market.

6. **SLIM initiative - phase IV**
- Oral presentation by the Commission
- Exchange of views

The **Council** took note of the Commission's presentation of the review of phase IV of the SLIM initiative, dealing with company law, the dangerous substances directive and directives on pre-packaged products, and expressed its intention to consider the Commission's forthcoming comprehensive evaluation of phases I-III at the first meeting of the Internal Market Council under the Portuguese Presidency.

- Political Agreement/Common Position
  - 13379/99 ETS 18 CODEC 730
  - 13378/99 ETS 17 CODEC 729

The **Council** reached a unanimous political agreement on a common position on the above proposal for a Directive, as it stands in document 13378/99. The Common Position will be put on the agenda of a forthcoming Council as an "A" item as soon as the texts have been finalised.

   - Progress report
   12913/99 PI 61 CULTURE 84 CODEC 681

   The Council took note of the progress report in 12913/99 PI 61 CULTURE 84 CODEC 681.


   - Political Agreement/Common Position
   13657/99 ECO 403 CONSOM 77 CODEC 750
   13655/99 ECO 402 CONSOM 76 CODEC 749

   1. With a view to adopting a common position on this Directive, the Council reached a political agreement, with the Belgian delegation abstaining, on the draft submitted by the Permanent Representatives Committee (doc. 13655/99, subject to the following amendments:

   a) **Article 3 (5) (a) (i) to be amended as follows:**

   "- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;"

   b) **the following recitals relating to Article 3 to be added:**

   "whereas national courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide Information Society services in conformity with conditions established in this Directive;"

   "whereas Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission;"

   c) **the following new sub-paragraph to be added as Article 8(4):**

   "This Directive applies in addition to Community Directives concerning access to and the exercise of activities of the regulated professions."
d) the following new recital relating to Article 8 to be added:

"Whereas this Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field;"

e) Article 12(1), introductory sentence, to be amended to read as follows:

"Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider shall not be liable for the information transmitted, on condition that the provider:

f) the following new recital relating to Articles 12 and 13 to be added before the two recitals already agreed in footnote 22 of doc. 13655/99:

"Whereas the exemptions from liability established in this Directive cover only cases where the activity of the Information Society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; whereas this activity is of a mere technical, automatic and passive nature which implies that the Information Society service provider has neither knowledge of nor control over the information which is transmitted or stored;"

g) Article 13(1), introductory sentence, to be amended to read as follows:

"Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider shall not be liable 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:"

h) Article 14(1), introductory sentence, to be amended to read as follows:

"Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that:"
i) Recital relating to Article 14 (footnote 23 of doc. 13655/99) to be amended as follows:

"Whereas, in order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; whereas the removal or disabling of access has to be undertaken in the respect of the principle of freedom of expression and of procedures established for this purpose at national level; whereas this Directive does not affect Member States' possibility to establish specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information".

j) the following recital relating to Article 15 to be added:

"whereas this Directive does not affect the possibility for Member States to require service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities;"

k) Article 23 to be amended as follows:

"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, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of Information Society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the Internal Market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments and the possibility of applying the Internal Market principles to unsolicited commercial communications by e-mail."

l) Article 24, first sentence, to be amended to read as follows:

"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within 18 months of its entry into force."
2. The Council also agreed to enter the statements as set out in Annex I in the minutes of the meeting.

3. The Council invited the Permanent Representatives Committee to undertake the finalisation of the recitals and the necessary legal and linguistic adjustment of the draft Directive, with a view to formal adoption of the common position as an "A" item at a forthcoming session of the Council.

10. Amended proposal for a Directive of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art
   - Political Agreement/Common Position
     13678/99 PI 64 CULTURE 92 CODEC 751
     11857/99 PI 53 CULTURE 68 CODEC 565
     + COR 1

   The Council, after continuing its examination of the above proposal for a Directive, concluded that it was not yet in a position to reach an agreement which would take account of the concerns of all the delegations. It therefore instructed the Permanent Representatives Committee to continue work on this proposal with a view to enabling the Council to reach agreement, possibly at a further Council meeting (Internal Market) before the end of the year.

   - Political Agreement/Common Position
     9482/99 DRS 18 CODEC 368
     + COR 1 (nl)

   The Council took note that negotiations on the outstanding question were still going on between the parties concerned and that positive results were envisaged in the near future. The Council instructed the Permanent Representatives Committee to resume work on this dossier immediately after the Helsinki European Council on 10 and 11 December 1999, with a view to enabling the Council to reach agreement, possibly at a further Council meeting (Internal Market) before the end of the year.

- Political Agreement/Common Position
  13316/99 UD 123 CODEC 723
  12751/99 UD 118 CODEC 665
  9478/98 UD 84 CODEC 342
  + COR 1 (f,d,en)

The Council adopted the Conclusions as set out in Annex II.

13. **Amended proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Directives 97/7/EC and 98/27/EC**

- Council Conclusions
  13470/99 CONSOM 75 ECOFIN 261 CODEC 735

The Council adopted the Conclusions as set out in the annex to 13470/99.

14. **Parallel imports/Exhaustion of trademark rights**

- Oral report from the Commission

The Council took note of an oral report from the Commission and of the intervention of the Swedish delegation.

15. **Public procurement**

- Progress report presented by the Commission

The Council took note of the Commission’s intention to present, in the early months of 2000, to amend the legislative framework for public procurement in the Community, and of its intention to produce interpretative communications regarding, firstly, the relationship between public procurement and the protection of environment and, secondly, the treatment of concessions in public procurement, as well as of its intention to produce a communication about SMEs and public procurement.
16. **Review of chemical policy**
- Oral report from the Commission

The Commission reported on the state of play concerning the revision of the chemical product policy which forms part of the ongoing review of the Union’s chemical policy and which is a follow-up to the Conclusions of the Council (Environment) on 24 June 1999.

The Council took note of this report and agreed to revert to this matter at a forthcoming session.

17. **Follow-up to the Council Resolution on standardisation**
- Commission Statement
  12686/99 MI 111 ECO 365

The Council took note of a presentation by the Commission regarding future work on standardisation in the light of the Resolution adopted on 28 October 1999, and expressed its strong interest in being kept regularly informed about further progress in the implementation of the Resolution.

18. **Vertical Directives on foodstuffs:**
   a) **Proposal for a Council Directive relating to certain partly or wholly dehydrated preserved milk for human consumption**
   c) **Proposal for a Council Directive relating to fruit juices and certain similar products intended for human consumption**
   = Political Agreement
     13698/99 DENLEG 31
     + COR 1 (en)
     + ADD 1
     + ADD 2
     + ADD 3
     + ADD 3 COR 1

   1. The Council reached agreement:

      - with regard to item (a), by a qualified majority, on the text as set out in 13698/99 DENLEG 31 ADD 1, the Belgian delegation having stated its intention of voting against the Directive when it is finally adopted;
– with regard to item (b), unanimously, on the text as set out in 13698/99 DENLEG 1 ADD 2;

– with regard to item (c), by a qualified majority, on the text as set out in 13698/99 DENLEG 31 ADD 3 + COR 1, the Netherlands delegation having stated its intention of abstaining and the Belgian delegation its intention of voting against the Directive when it is finally adopted,

on the understanding that the European Parliament will be consulted again on the three proposals as the change made by the Council to the committee procedure initially proposed by the Commission must be considered a substantive amendment.

2. The Council also noted the statements as set out in Annex III to be entered in the minutes of the Council meeting at which the Directives are finally adopted.

19. Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the European Community and on the free movement of such data

- Progress report
  13102/99 ECO 382 CODEC 702
  11144/99 ECO 298 CODEC 500

On the basis of the progress report set out in doc. 13102/99, the Council took note of progress achieved on this proposal and instructed the Permanent Representative Committee to actively take matters forward with a view to a rapid adoption of this Regulation, if possible, at the end of the first reading.

20. Other Business

No items were raised under this heading.
STATEMENTS FOR THE COUNCIL MINUTES

Re item 9 of the agenda

a) **The three declarations included in Appendix II to document 13655/99, with the 2nd declaration on consumer confidence amended as follows:**

"The Council recalls its resolution of 19 January 1999 in which it considers that, in order to develop consumer confidence in Information Society services and to promote the development of electronic commerce, consumers should, in the case of cross-border transactions, within the framework of Community law and of the Brussels and Rome Conventions, be able to benefit from the protection afforded by the legislation of their country of habitual residence and to have easy access to redress procedures, in particular within their country of habitual residence."

b) **Statement by the representatives of the Governments of the Member States meeting within the Council:**

"Without prejudice to Community law, the representatives of the Governments of the Member States meeting within the Council, hereby undertake to take all necessary steps to ensure that their criminal legislation does not obstruct internal market principles in the directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, where necessary by amending their criminal legislation."

c) **Declaration by the Belgian, German, Danish and Swedish delegations**

"Regarding the implementation of the Joint Commission and Council Declaration on Commercial Communications, the Belgian, German, Danish and Swedish delegations declare that they are looking forward to a legislative initiative of the Commission in the year 2000 which shall aim to ensure that commercial communications will not contain misleading statements concerning business circumstances and will fulfil the standard of fair business practice, taking into consideration the fundamental values inherent in the legislation of Member States, namely freedom of competition and freedom of advertising."
d) **Unilateral declaration by the German delegation**

"1. The German delegation declares that the relationship between the Directive on certain legal aspects of electronic commerce and specific Directives on freedom of services concerning regulated professions is of a cumulative nature.

2. Article 3 paragraphs 1 and 2 of this Directive is without prejudice to the provisions of those Directives and provisions of national legislation being in conformity with Community law."

e) **Commission Declaration concerning the Council Declaration on consumer protection**

"The Commission recalls its declaration to the minutes of the Consumer Council of 3 November 1998 relating to the Council Resolution on the Consumer Dimension of the Information Society. In this declaration the Commission underlined that the application of the law of the consumer's country of residence to consumer-contracts should be without prejudice to Community law, which includes the present Directive. Furthermore, the Commission reserved its position concerning future legislative proposals."

f) **Commission declaration on cyber crime**

"The Commission recognises the importance of the fight against cyber crime and the need to continue to develop a coherent approach throughout the different Community policies concerned. In addition to forthcoming Commission initiatives in this field, the Commission will give the fight against cyber crime particular attention within the context of the regular reports on the application of this Directive and the need for its adaptation to legal and technological developments."
Re item 12 of the Agenda

Council Conclusions on Community Customs Code

"The Council,

- RECOGNISING the difficulties which could arise if it officially confirms the political agreement on the draft regulation amending Regulation (EEC) No 2913/92 establishing the Community Customs Code, as set out in 12751/99, on which there is unanimity among the Member States,

- EMPHASISES the importance of the proposal to amend the above-mentioned Regulation for the purpose of modernising customs legislation;

- TAKES NOTE OF the considerable progress which has been achieved towards a compromise agreement on the proposed Regulation;

- NOTES that some further reflection is needed;

- AGREES to request the Permanent Representatives Committee, in consultation with the Commission, to continue its efforts to arrive at a solution in the near future."

________________________
STATEMENTS FOR THE COUNCIL MINUTES

Re items 18(a), (b) and (c) of the agenda

Statement by the Commission concerning Articles 4 (sugars), 5 (milk) and 6 (fruit juices)

1. "The delegation of powers to adapt Community acts to technical progress is a general principle whereby the legislator provides for a simplified procedure for adapting Community acts to developments in science and technology. Consequently, this principle also affects other sectors than that of foodstuffs in the strict sense. Thus the principle has been very widely followed in the past, not only for all "technical barriers" directives, but also for other important Community acts.

2. The Commission believes that speedy adaptation of legislation to technical progress is vital for the competitiveness of the European sectors concerned and that the committee procedure is the appropriate instrument to achieve this. Moreover, economic operators want the Community to speed up its decision-making process when new technical or scientific data become known.

3. The Commission is therefore of the opinion that the provisions of Articles 4 (proposal for a Directive on sugars), 5 (proposal for a Directive on preserved milk) and 6 (proposal for a Directive on fruit juices and similar products) are the most appropriate means of meeting these needs.

4. The Commission has analysed the Directives relating to preserved milk, sugars and fruit juices. In each of these Directives, the Commission takes account of adaptation to technical progress.

   • In the proposal on sugars, for example, the Directive makes reference to methods of analysis dating from 1969, which are now out of date; decisions on the adaptation of those methods could thus be made through a rapid committee procedure.

   • For the proposal on preserved milk, adaptations of the criteria of composition and treatment are laid down in Annexes I and II. The provision concerning the particular recommendation of use for infants is covered by the basic act.

   • For the proposal on fruit juices, for example: if a particular designation became necessary as the result of a new accession, it should be possible to take a decision on it through a rapid committee procedure. The same applies if it is necessary to lay down the precise substances used for the processing authorised in the manufacture of fruit juices and nectars.
In these three cases, "adaptation to technical progress" therefore does not apply to the scope of the Directives or to the product definitions contained in the Annexes."

Re item 18(a)

Statement by the Commission concerning the proposal relating to certain preserved milk

"The Commission states that it will closely monitor developments on the preserved milk market and in particular aspects concerning protein content. In doing so, it will examine the consequences in particular in regard to:

- the competitiveness of European undertakings;
- the provisions on preserved milk adopted in the framework of the Codex Alimentarius;
- the product image;
- the advisability of appropriate labelling;
- the impact on the Community budget.

The Commission will report to the Council during 2000. If necessary, it will propose an adaptation of the present Directive."

Re item 18(b)

Joint Council/Commission statements concerning methods of analysis (proposal relating to certain sugars)

(a) "The method described in Chapter B of the Annex to this Directive might need to be updated. The Commission undertakes to examine this question as soon as possible and will adopt measures where necessary.

(b) Commission Directive 79/796/EEC on methods of analysis is out of date. The Commission will take appropriate measures in this area."

Re item 18(c)

Statement by the Commission re ANNEX I – I – 1. (a) (b) (Proposal relating to fruit juices)

"Although it considers that the compromise solution reached on product definitions achieves a satisfactory balance between the interests of producers and consumers, the Commission undertakes to examine, before the final adoption of the act, the possible impact of the definition of fruit juice and fruit juice from concentrate on the market and on international trade."
"The Council and the Commission agree that it will be necessary to examine the impact of Part II, last indent of Annex I, and in particular the question of the content in oligosaccharides, and to submit proposals, if necessary."
COUNCIL OF THE EUROPEAN UNION

Common Position (EC) No 2000/ /EC
Adopted by the Council on .......

Draft Statement of the Council's Reasons
I. INTRODUCTION


2. The European Parliament delivered its Opinion at first reading on 6 May 1999 and the Economic and Social Committee delivered its Opinion on 29 April 1999.

3. On ……, 2000 the Council adopted its common position in accordance with Article 251 of the Treaty.

II. OBJECTIVE

The purpose of the draft Directive on certain legal aspects of electronic commerce is to remove barriers to the development of e-commerce in the European Union and to establish a legal framework which will allow the sector to benefit from the advantages of the Internal Market. To this end the text clarifies the application of key Internal Market principles (the country of origin principle and the free movement of services) to Information Society services, whilst supplementing the existing body of Community law with additional harmonization of certain specific legal aspects related to such services, notably concerning commercial communications, the on-line conclusion of contracts, the liability of intermediaries and the enforcement and implementation of the legal framework.

These measures are intended to eliminate the legal obstacles resulting from divergent or overlapping Member State legislation and thereby guarantee, in conjunction with the existing acquis, the free movement of on-line services within the Community.
III. **ANALYSIS OF THE COMMON POSITION**

A. **General comments**

Although the Council adopted the approach and aims proposed by the Commission and supported by the Parliament, it considered it necessary, when drawing up its common position, to make a number of changes to both the substance and the wording of the proposed Directive.

When making these changes the Council's main concerns were to:

- render the wording of the Directive more precise and thus improve the legal clarity of the text;
- clarify the scope of certain provisions, in particular those relating to the application of the country of origin principle and the freedom to provide services;
- take greater account of the diversity of national situations, in particular as regards the moment at which the contract is concluded;
- foster a higher degree of confidence among consumers;
- ensure that the Directive does not adversely affect the fight against crime committed in the Internet environment.
B. Specific comments

1. Principal changes made to the Commission proposal

(a) Relationship of the draft Directive with International Private Law

The Council has considered it necessary to clarify the relationship of the draft Directive's provisions on home country control with existing provisions of international private law, in particular the Brussels and Rome Conventions. With this in mind a new paragraph 4 in Article 1 states clearly that the Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts. Furthermore additions to the Annex (formerly Annex II) of the Directive ensure that the freedom of parties to choose the law applicable to their contract is preserved, and that certain real estate contracts are not affected by the home country control provisions.

(b) Ensuring the efficacy of criminal investigations and certain other general interest objectives

The Council was concerned that the draft Directive should not result in it becoming more difficult to investigate criminal offences occurring in the context of electronic commerce, and with this in mind a number of modifications of the Commission's proposal have been made. Changes to Article 3(4) (Article 22(3) of the Commission proposal) permit Member States to derogate in particular cases from the Directive's requirements concerning the country of origin principle and the free movement of Information Society services, where this is necessary for public policy, in particular the prevention, investigation, detection or prosecution of a criminal offences. Article 15(2) now makes it clear that Member States may require service providers to inform the competent public authorities of alleged illegal activities or in some cases require service providers to communicate details of their clients. Finally the requirement to re-
examine the Directive laid down in Article 21 (Article 24 of the Commission proposal) now specifically mentions "crime prevention" as one possible reason for adapting the Directive in the future.

On related issues it should also be noted that a further addition to Article 3(4) will permit case-by-case derogations for violations of human dignity, whilst Article 21 also now refers to the protection of minors.

(c) Modifications regarding electronic contracts

The Council considered that it was not appropriate to harmonize national law regarding the moment at which a contract is concluded. For this reason Article 11 has been renamed and now limits itself to certain requirements regarding the placing and receipt of orders on-line. In addition, the Council, whilst fully supporting the principle in Article 9 guaranteeing the legal validity of electronic contracts, nevertheless considered it necessary to add exemptions to this provision for contracts transferring rights in real estate and for certain contracts of involving suretyship and collateral securities.

(d) Deletion of Comitology

The Commission had proposed that it be granted implementing powers in respect of the Directive's scope (Article 22(1)(c) of the Commission proposal), and its provisions on regulated professions (Article 8(3)), electronic contracts (Article 9(3)), co-operation between authorities (Article 19(6) and (7)) and electronic media (Article 20)). The Council considered that the powers granted to the Commission under Articles 9 and 22 went beyond the implementation framework and were therefore incompatible with Article 202 of the Treaty. The powers granted under Articles 8, 19 and 20 of the proposal were considered unnecessary. Therefore these parts of the Commission proposal have been modified or deleted, together with Article 23 of the proposal which established a Consultative Committee to assist the Commission.
2. The Council's position on the European Parliament amendments

(a) Amendments incorporated fully or in part into the common position

The Council incorporated the full wording of amendments 1, 2, 4, 6, 7, 18, 20, 24, 40, 43, 55, 56, 57, and 62 and the principle of amendments 3, 5, 9, 11, 12, 15, 16, 17, 19, 22, 23, 25, 29, 32, 33, 34, 37, 64 and 67.

The Council incorporated amendments 14, 38, and 73 in part, generally aligning its position with that of the Commission.

(b) Amendments not incorporated into the common position

In not incorporating amendments 8, 10, 21, 26, 27, 28, 30, 39, 45, 46, 47, 48, 49, 53, 54, 58, 59, 60, 61, 63 and 68, the Council followed the Commission's negative opinion.

In not incorporating amendments 13, 42 and 65, the Council based its decisions on the following considerations:

- regarding amendment 13, the Council noted that Directive 97/66/EC (the "Telecommunications Data Protection" Directive) does not include specific provisions requiring Member States to abstain from prohibiting or restricting the use of cryptographic tools and that therefore this amendment was technically incorrect;

- amendment 42 was considered by the Council to be inconsistent with its overall approach to Article 11 (see point B.1.c. above);
regarding amendment 65, the Council took the view that a requirement to include statistical results in the report was overly prescriptive, whilst the term "digital technologies" was better covered by the broader expression chosen.
COUNCIL OF 
THE EUROPEAN UNION

Brussels, 28 janvier 2000

14263/99
ADD 1 COR 1 (en)
LIMITE
ECO 419
CONSUM 80
CODEC 826

CORRIGENDUM TO THE DRAFT STATEMENT OF THE COUNCIL'S REASONS


The title of the document should read as follows:


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COUNCIL OF THE EUROPEAN UNION

Brussels, 2 February 2000

5823/00

LIMITE

ECO 22
CONSUM 4
CODEC 77

"I/A" ITEM NOTE

from: General Secretariat
to: COREPER/COUNCIL

No. prev. doc.: 13655/99 ECO 402 CONSOM 76 CODEC 749
No. Cion prop.: 5123/99 ECO 2 CODEC 6

Subject: Adoption of the common position of the Council with a view to the adoption of a Directive of the European Parliament and Council on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce")


2. The European Parliament delivered its first-reading Opinion on this proposal on 6 May 1999 and the Economic and Social Committee had already issued its Opinion on 29 April 1999.

3. At its meeting on 7 December 1999, the "Internal Market" Council reached a political agreement on the draft Directive, with a view to adopting its common position. It should be noted that the Belgian delegation abstained.
4. The Legal/Linguistic Experts have in the meantime finalised the text of the common position, and the Committee could therefore recommend the Council to adopt the common position and the accompanying statement of the Council's reasons, as set out in documents 14263/99 ECO 419 CONSOM 80 CODEC 826 and 14263/99 ADD 1 COR 1+COR 2 ECO 419 CONSOM 80 CODEC 826, as and "A" item on the agenda of one of its forthcoming meetings.
CORRIGENDUM TO THE DRAFT STATEMENT OF THE COUNCIL'S REASONS

("Directive on electronic commerce")

Page 4, B, 1 (a), 2nd and 3rd lines should read as follows:

"... draft Directive's provisions on home country control with provisions of international private law, in particular the existing Brussels and Rome ...".
LEGISLATIVE ACTS AND OTHER INSTRUMENTS

DIRECTIVE 2000/...EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

on certain legal aspects of Information Society services,
in particular electronic commerce, in the Internal Market
("Directive on electronic commerce")

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission ¹,

Having regard to the Opinion of the Economic and Social Committee ²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ³,

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¹ OJ C 30, 5.2.1999, p. 4 and OJ C
² OJ C 169, 16.6.1999, p. 36.
Council Common Position of (OJ C ) (not yet published in the Official Journal) and
Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 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; the development of Information Society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples;

(2) 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;

(3) 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; 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;
(4) It is important to ensure that electronic commerce could fully benefit from the Internal Market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities 1, a high level of Community integration is achieved;

(5) The development of Information Society services within the Community is hampered by a number of legal obstacles to the proper functioning of the Internal Market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; 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; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State;

(6) In the light of Community objectives, of Articles 43 and 49 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; 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 5 of the Treaty;

In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the Internal Market;

The objective of this Directive is to create a legal framework to ensure the free movement of Information Society services between Member States and not to harmonise the field of criminal law as such;

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; 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; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression;

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; 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; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies;

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¹ OJ L 95, 21.4.1993, p. 29.
⁷ OJ L 80, 18.3.1998, p. 27.

(12) 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; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the Internal Market; 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;

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4 OJ L ...
(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce;

(14) The protection of individuals with regard to the processing of personal data is solely governed by 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 on the free movement of such data 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 which are fully applicable to Information Society services; these Directives already establish a 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 personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet;

(15) The confidentiality of communications is guaranteed by Article 5 of Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised;

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services;

(17) The definition of Information Society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services \(^1\) and in 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 \(^2\); this definition covers any service normally provided for remuneration, at a distance, 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; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition;

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(18) Information Society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; Information Society services 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; Information Society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not Information Society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video on demand or the provision of commercial communications by electronic mail are Information Society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an Information Society service; the contractual relationship between an employee and his employer is not an Information Society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not Information Society services;
(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; 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 but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service;

(20) 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;

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to Information Society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member State's legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member State's requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art;
(22) Information Society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; 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; 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; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such Information Society services should in principle be subject to the law of the Member State in which the service provider is established;

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide Information Society services as established in this Directive;

(24) In the context of this Directive, notwithstanding the rule on the control at source of Information Society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of Information Society services;

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide Information Society services in conformity with conditions established in this Directive;
(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission;

(27) This Directive, together with Directive 2000/.../EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creation of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances to restrict the freedom to provide Information Society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors;

(28) The Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification services;

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(29) Commercial communications are essential for the financing of Information Society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC;

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and Information Society service providers and may disrupt the smooth functioning of interactive networks; 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; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; 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; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient;

(31) Member States which allow the sending of unsolicited commercial communication by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves;
(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions 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; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations;

(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field;

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; 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; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures 1; the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for;

(35) This Directive does not affect Member States' possibility to maintain or establish general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures;

(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary;

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases;

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law;

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of Information Society services;
Both existing and emerging disparities in Member States' legislation and case-law concerning 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; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of Information Society services to adopt and implement such procedures; 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;

This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based;
(42) The exemptions from liability established in this Directive cover only cases where the activity of the Information Society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the Information Society service provider has neither knowledge of nor control over the information which is transmitted or stored;

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission;

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities;

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it;
(46) In order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility to establish specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information;

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation;

(48) This Directive does not affect the possibility for Member States to require service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities;

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties to decide freely whether to adhere to such codes;
(50) It is important that the proposed Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society 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;

(51) 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; 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;

(52) The effective exercise of the freedoms of the Internal Market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with Information Society services is characterised both by its rapidity and by its geographical extent; 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; Member States should examine the need to provide access to judicial procedures by appropriate electronic means;

(53) Directive 98/27/EC, which is applicable to Information Society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of Information Society services by ensuring a high level of consumer protection;
(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive;

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence;

(56) 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;

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State;

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, UNCITRAL) on legal issues;
(59) 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; such coordination should also contribute to the establishment of a common and strong negotiating position in international fora;

(60) 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;

(61) 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;

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners;
(63) 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; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of Information Society services; in any case, the development of the Information Society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment;

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields;

(65) The Council, in its Resolution of 19 January 1999 on the Consumer Dimension of the Information Society¹, stressed that the protection of consumers deserved special attention in this field; 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; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Objective and scope

1. This Directive seeks to contribute to the proper functioning of the Internal Market by ensuring 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, certain national provisions on Information Society services relating to the Internal Market, 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 level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them insofar as this does not restrict the freedom to provide Information Society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.
5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to Information Society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of Information Society services:

   – the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority;

   – the representation of a client and defence of his interests before the courts;

   – gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.
For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "Information Society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(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 indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, 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) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;
(f) "commercial communication": 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 regulated profession. The following do not in themselves 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, particularly when this is without financial consideration;


(h) "coordinated field": requirements laid down in Member States' legal systems applicable to Information Society service providers or Information Society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has
to comply in respect of:

– the taking up of the activity of an Information Society service, such as
requirements concerning qualifications, authorisation or notification;

– the pursuit of the activity of an Information Society service, such as
requirements concerning the behaviour of the service provider, requirements
regarding the quality or content of the service including those applicable to
advertising and contracts, or requirements concerning the liability of the
service provider.

(ii) The coordinated field does not cover requirements such as:

– requirements applicable to goods as such;

– requirements applicable to the delivery of goods;

– requirements applicable to services not provided by electronic means.

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

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given Information Society service if the following conditions are fulfilled:

(a) the measures shall be:

   (i) necessary for one of the following reasons:

   – public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;

   – the protection of public health;

   – public security, including the safeguarding of national security and defence;

   – the protection of consumers, including investors;
(ii) taken against a given 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) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate;

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility to proceed with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.
CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4
Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an Information Society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

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 of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services ¹.

Article 5
General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

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

¹ OJ L 117, 7.5.1997, p. 15.
(c) the details 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 or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

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

– the professional title and the Member State where it has been granted;

– a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where Information Society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an Information Society service comply at least 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 permitted in the Member State where 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 clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.
Article 7
Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously 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 electronic 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 ensure that the use of commercial communications which are part of, or constitute, an Information Society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, 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 commercial communication in conformity with the rules referred to in paragraph 1.
3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close co-operation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9
Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10
Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11

Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

– the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means;
the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4 Liability of intermediary service providers

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 a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable 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 insofar 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.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

**Article 13**

**Caching**

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable 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 widely recognised and used by industry;
the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

Article 14
Hosting

1. Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

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

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 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. Member States may establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.
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, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(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 trade, 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. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with point (a) of paragraph 1. Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.
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 the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant 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 court actions available under national law concerning Information Society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.
2. The Annex to Directive 98/27/EC shall be supplemented as follows:


Article 19
Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.
4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20
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.
CHAPTER IV
FINAL PROVISIONS

Article 21
Re-examination

1. Before ……… *, 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 legal, technical and economic developments in the field of Information Society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the Internal Market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the Internal Market principles to unsolicited commercial communications by electronic mail.

* Three years after the date of entry into force of this Directive.
Article 22
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before …… *. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, 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 23
Entry into force

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

* 18 months after the date of entry into force of this Directive.
Article 24
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
Derogations from Article 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

– copyright, neighbouring rights, rights referred to in Directive 87/54/EEC ¹ and Directive 96/9/EC ² 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 8(1) of Directive 2000/..//EC ³;

– Article 44(2) of Directive 85/611/EEC ⁴;


¹ OJ L 24, 27. 1.1987, p. 36.
– the freedom of the parties to choose the law applicable to their contract;

– contractual obligations concerning consumer contracts;

– formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated;

– the permissibility of unsolicited commercial communications by electronic mail.
LIST OF "A" ITEMS

for: 2245th meeting of the COUNCIL OF THE EUROPEAN UNION
(ECONOMIC AND FINANCIAL QUESTIONS)
Brussels, Monday 28 February 2000

1. VAT – Reduced rate for labour-intensive services (LA + S)¹
   5057/00 FISC 6
   + ADD 1
   5033/00 FISC 4
   + COR 1 (fr, de, it, nl, da, el, pt, fi, sv)
   + COR 3 (fr, de, it, nl, da, el, es, pt, fi, sv)
   + REV 1 (es)
   + REV 1 COR 1 (es)
   + REV 1 COR 2 (es)
   + REV 1 COR 3 (es)
   approved by Coreper, Part 2, on 13.1.2000

2. VAT – Derogation for Germany (Article 27)
   = Deduction of certain expenses (LA + S)¹
   5058/00 FISC 7
   + ADD 1
   5034/00 FISC 5
   + COR 1 (de, da, en, fi, pt, sv)
   approved by Coreper, Part 2, on 13.1.2000

3. Adoption of a Council Regulation amending Regulation (EC) No 3605/93 on the application
   of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the
   European Community (LA + S)¹
   6175/00 UEM 29
   + COR 1 (fr)
   + COR 2 (fi)
   6183/00 UEM 36
   + ADD 1
   approved by Coreper, Part 2, on 23.2.2000

¹ (LA + S) = legislative act + statement
4. Proposal for transfer of appropriations No 1/2000 from chapter to chapter within Section V - Court of Auditors - of the general budget for the financial year 2000 (NCE)
   5961/00 FIN 36 PE-L 7
   approved by Coreper, Part 2, on 17.2.2000

5. Proposal for transfer of appropriations No 2/2000 between chapters within Section VII - Committee of the Regions - of the general budget for the financial year 2000 (CE/NCE)
   6028/00 FIN 39 PE-L 8
   approved by Coreper, Part 2, on 23.2.2000

   6029/00 FIN 40 PE-L 9
   approved by Coreper, Part 2, on 17.2.2000

7. Adoption of a Council Decision appointing a member of the Advisory Committee of the Euratom Supply Agency
   6162/00 ATO 11
   approved by Coreper, Part 2, on 23.2.2000

8. Draft Decision of the EEA Joint Committee amending Annex XX (Environment) to the Agreement
   14186/99 EEE 138 ENV 457
   14187/99 EEE 139 ENV 458
   approved by Coreper, Part 2, on 17.2.2000

9. Draft Decision of the EEA Joint Committee amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms (education, training and youth)
   5640/00 EEE 8 SOC 31 EDUC 11
   5641/00 EEE 9 SOC 32 EDUC 12
   approved by Coreper, Part 2, on 17.2.2000

10. EC-ASEAN Cooperation Agreement: Commission recommendation for a Council Decision to negotiate an extension of the Agreement to Laos and Cambodia
    5124/00 ASIE 1
    5125/00 ASIE 2
    5632/00 ASIE 6
    approved by Coreper, Part 2, on 2.2.2000

    6024/00 PESC 53 COWEB 19
    + COR 1 (pt)
    6025/00 PESC 54 COWEB 20
    + COR 1 (en)
    approved by Coreper, Part 2, on 17.2.2000
   5988/00 PESC 44 COWEB 16
   5989/00 PESC 45 COWEB 17
   approved by Coreper, Part 2, on 17.2.2000

   6368/00 PESC 77 COWEB 29
   6369/00 PESC 78 COWEB 30
   approved by Coreper, Part 2, on 23.2.2000

14. Adoption of a Council Decision on the rules applicable to national experts in the military field on secondment to the General Secretariat of the Council during the interim period
   6251/00 PESC 68 COPOL 14 COSEC 22
   6373/00 PESC 79 COPOL 15 COSEC 26
   (poss.) + COR 1
   approved by Coreper, Part 2, on 28.2.2000

15. Public access to Council documents
    - Confirmatory application by Mr BUNYAN (01/00)
      5438/00 INF 4 API 3 JUR 13
    - Confirmatory application by Mr PEERS (01/00)
      5441/00 INF 7 API 6 JUR 16
    - Confirmatory application by Mr LOUSKI (01/00)
      5785/00 INF 12 API 10 JUR 31
   approved by Coreper, Part 2, on 23.2.2000

16. Adoption of a common position of the Council with a view to the adoption of a Regulation of the European Parliament and of the Council on development cooperation with South Africa (cp + s) \(^1\)
    5692/00 ACP 14 CODEC 69
    + ADD 1
    5095/00 ACP 2 CODEC 5
    5095/1/00 REV 1 ACP 2 CODEC 5 (fi)
   – Statement of reasons
    5095/2/00 REV 2 ADD 1 ACP 2 CODEC 5
   approved by Coreper, Part 2, on 17.2.2000

17. Relations with Morocco
    = Draft Council Decision concluding the Agreement in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning certain amendments to Annexes 2, 3, 4 and 6 to the EU-Morocco Euro-Mediterranean Agreement
    6207/00 MA 4
    6136/00 MA 3
   approved by Coreper, Part 2, on 23.2.2000

\(^1\) (cp + s) = common position + statement
18. Public access to documents: complaint sent by Mr Jakob Werner to the European Ombudsman (1259/99/ME)

5262/00 OMBUDS 1 INST 1 JUR 5
approved by Coreper, Part 2, on 23.2.2000

19. Written Questions put to the Council by Members of the European Parliament
   a) No E-2393/99 by Jean-Claude MARTINEZ - Lethal flooding in the south of France
      5075/00 PE-QE 15
      + COR 1
   b) No 2401/99 by Bart STAES – Priority of international law over a European Union Directive, and compliance with provisions of treaties concerning the “Iron Rhine”
      5074/00 PE-QE 14
   c) No 2508/99 by Jaime VALDIVIELSO de CUÉ - Trade
      5068/00 PE-QE 8
   d) No 2571/99 by W.G. van VELZEN - Secretariat of the Energy Charter
      5072/00 PE-QE 12
      + COR 1
   e) No 2697/99 by Rosa DÍEZ GONZÁLEZ - Information on European Union citizens condemned to death
      5071/00 PE-QE 11
      + COR 1
approved by Coreper, Part 1, on 16.2.2000

20. Adoption
      14263/99 ECO 419 CONSOM 80 CODEC 826
      + COR 1 (fi)
      + COR 2 (fr)
      + COR 3 (sv)
      + COR 4 (nl)
      + COR 5 (sv)
      + COR 6 (fr)

   b) of a statement of reasons
      14263/99 ECO 419 CONSOM 80 CODEC 826 ADD 1
      + ADD 1 COR 1 (en)
      + ADD 1 COR 2
      5823/00 ECO 22 CONSOM 4 CODEC 77
      approved by Coreper, Part 1, on 9.2.2000

¹ (cp) = common position
21. Adoption
   a) of the common position with a view to the adoption of a Regulation of the European Parliament and of the Council amending Council Regulation (EEC) No 3330/91 on the statistics relating to the trading of goods between the Member States, with specific reference to a simplified application of the nomenclature of products (cp + s)¹
   5666/00 ECO 14 UD 6 CODEC 66
       + ADD 1
   14100/99 ECO 412 UD 150 CODEC 802
       + COR 1 (sv)
       + COR 2 (fi)

   b) of the statement of reasons
   14100/99 ECO 412 UD 150 CODEC 802 ADD 1
       + ADD 1 REV 1 (fi)
   approved by Coreper, Part 1, on 16.2.2000

   - Common approach with a view to adoption of the Decision
     6164/00 ECO 29 ENT 21
     + COR 1 (fr,de,it,nl,en,el,fi,sv)
     5991/99 ECO 48 ENT 39
     approved by Coreper, Part 1, on 23.2.2000

23. Draft Council Decision on the position of the European Community on the draft Regulation of the United Nations Economic Commission for Europe concerning the approval of motor vehicle headlamps emitting an asymmetrical passing beam or a driving beam or both and equipped with filament lamps
   - Common approach with a view to adoption of the Decision
     6165/00 ECO 30 ENT 22
     5634/99 ECO 25 ENT 19
     approved by Coreper, Part 1, on 23.2.2000

24. Draft Council Decision on the position of the European Community on the draft Regulation of the United Nations Economic Commission for Europe concerning the approval of motor vehicle headlamps emitting a symmetrical passing beam or a driving beam or both and equipped with filament lamps
   - Common approach with a view to adoption of the Decision
     6166/00 ECO 31 ENT 23
     5635/99 ECO 26 ENT 20
     approved by Coreper, Part 1, on 23.2.2000

¹ (cp + s) = common position + statement
25. Draft Council Decision on the position of the European Community on the draft Regulation of the United Nations Economic Commission for Europe concerning the approval of specific components of motor vehicles using compressed natural gas (CNG) in their propulsion systems and of vehicles with regard to the installation of specific components of an approved type for the use of compressed natural gas (CNG) in their propulsion systems

6167/00 ECO 32 ENT 24
12833/98 ECO 397 ENT 196
+ COR 1 (it)
approved by Coreper, Part 1, on 23.2.2000


6168/00 ECO 33 ENT 25
12832/98 ECO 396 ENT 195
approved by Coreper, Part 1, on 23.2.2000

27. Adoption of
   a) a common position with a view to the adoption of a Regulation of the European Parliament and of the Council allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (cp + s) "1

10677/99 ENV 282 CODEC 468
  + REV 1 (de)
  + COR 1 (da)
  + COR 2 (fi)
  + COR 4 (de,it,en,da,el,pt,fi,sv)
  + COR 5 (de,it,pt)
5450/00 ENV 13 CODEC 44

b) a statement of reasons

10677/99 ENV 282 CODEC 468 ADD 1
  + ADD 1 COR 1 (de)
approved by Coreper, Part 1, on 26.1.2000


- Convening of the Conciliation Committee

6261/00 CODEC 127 SURE 9
approved by Coreper, Part 1, on 16.2.2000

1 (cp + s) = common position + statement
   - Convening of the Conciliation Committee
     6262/00 CODEC 128 MI 18 ECO 35 FIN 54 EEE 15
     approved by Coreper, Part 1, on 16.2.2000

30. Advisory Committee on Safety, Hygiene and Health Protection at Work:
    Replacement of Mr M. MARTIN, member, who has resigned; appointment of
    Mr J.-C. BODARD
     6049/00 SOC 40
     approved by Coreper, Part 1, on 16.2.2000

31. Renewal of the Advisory Committee on Social Security for Migrant Workers
     5544/1/00 SOC 26 REV 1
     approved by Coreper, Part 1, on 23.2.2000
LEGISLATIVE ACTS AND OTHER INSTRUMENTS

DIRECTIVE 2000/ /EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

on certain legal aspects of Information Society services,
in particular electronic commerce, in the Internal Market
("Directive on electronic commerce")

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission ¹,

Having regard to the Opinion of the Economic and Social Committee ²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ³,

₁ OJ C 30, 5.2.1999, p. 4 and OJ C

₂ OJ C 169, 16.6.1999, p. 36.

Council Common Position of (OJ C ) (not yet published in the Official Journal) and
Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 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; the development of Information Society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples;

(2) 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;

(3) 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; 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;
(4) It is important to ensure that electronic commerce could fully benefit from the Internal Market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities 1, a high level of Community integration is achieved;

(5) The development of Information Society services within the Community is hampered by a number of legal obstacles to the proper functioning of the Internal Market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; 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; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State;

(6) In the light of Community objectives, of Articles 43 and 49 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; 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 5 of the Treaty;

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In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the Internal Market;

The objective of this Directive is to create a legal framework to ensure the free movement of Information Society services between Member States and not to harmonise the field of criminal law as such;

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; 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; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression;

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; 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; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies;

7 OJ L 80, 18.3.1998, p. 27.

(12) 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; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the Internal Market; 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;

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4 OJ L ...
(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce;

(14) The protection of individuals with regard to the processing of personal data is solely governed by 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 on the free movement of such data \(^1\) 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 \(^2\) which are fully applicable to Information Society services; these Directives already establish a 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 personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet;

(15) The confidentiality of communications is guaranteed by Article 5 of Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised;

\(^1\) OJ L 281, 23.11.1995, p. 31.
(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services;

(17) The definition of Information Society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services ¹ and in 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 ²; this definition covers any service normally provided for remuneration, at a distance, 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; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition;

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(18) Information Society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; Information Society services 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; Information Society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not Information Society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video on demand or the provision of commercial communications by electronic mail are Information Society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an Information Society service; the contractual relationship between an employee and his employer is not an Information Society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not Information Society services;
(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; 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 but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service;

(20) 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;

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to Information Society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member State's legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member State's requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art;
(22) Information Society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; 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; 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; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such Information Society services should in principle be subject to the law of the Member State in which the service provider is established;

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide Information Society services as established in this Directive;

(24) In the context of this Directive, notwithstanding the rule on the control at source of Information Society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of Information Society services;

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide Information Society services in conformity with conditions established in this Directive;
(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission;

(27) This Directive, together with Directive 2000/ /EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creation of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances to restrict the freedom to provide Information Society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors;

(28) The Member States' obligation not to subject access to the activity of an Information Society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ¹ consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification services;

(29) Commercial communications are essential for the financing of Information Society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC;

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and Information Society service providers and may disrupt the smooth functioning of interactive networks; 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; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; 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; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient;

(31) Member States which allow the sending of unsolicited commercial communication by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves;
In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions 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; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations;

This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field;

Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; 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; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures; the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for;

This Directive does not affect Member States' possibility to maintain or establish general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures;

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(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary;

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases;

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law;

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of Information Society services;
(40) Both existing and emerging disparities in Member States' legislation and case-law concerning 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; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of Information Society services to adopt and implement such procedures; 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;

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based;
(42) The exemptions from liability established in this Directive cover only cases where the activity of the Information Society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the Information Society service provider has neither knowledge of nor control over the information which is transmitted or stored;

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission;

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities;

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it;
In order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility to establish specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information;

Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation;

This Directive does not affect the possibility for Member States to require service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities;

Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties to decide freely whether to adhere to such codes;
It is important that the proposed Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society 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;

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; 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;

The effective exercise of the freedoms of the Internal Market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with Information Society services is characterised both by its rapidity and by its geographical extent; 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; Member States should examine the need to provide access to judicial procedures by appropriate electronic means;

Directive 98/27/EC, which is applicable to Information Society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of Information Society services by ensuring a high level of consumer protection;
(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive;

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence;

(56) 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;

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State;

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, UNCITRAL) on legal issues;
(59) 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; such coordination should also contribute to the establishment of a common and strong negotiating position in international fora;

(60) 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;

(61) 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;

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners;
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; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of Information Society services; in any case, the development of the Information Society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment;

Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields;

The Council, in its Resolution of 19 January 1999 on the Consumer Dimension of the Information Society ¹, stressed that the protection of consumers deserved special attention in this field; 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; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Objective and scope

1. This Directive seeks to contribute to the proper functioning of the Internal Market by ensuring 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, certain national provisions on Information Society services relating to the Internal Market, 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 level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them insofar as this does not restrict the freedom to provide Information Society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.
5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to Information Society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of Information Society services:
   
   – the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority;

   – the representation of a client and defence of his interests before the courts;

   – gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.
Article 2
Definitions

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

(a) "Information Society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(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 indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, 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) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;
(f) "commercial communication": 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 regulated profession. The following do not in themselves 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, particularly when this is without financial consideration;


(h) "coordinated field": requirements laid down in Member States' legal systems applicable to Information Society service providers or Information Society services, regardless of whether they are of a general nature or specifically designed for them.

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\(^1\) OJ L 19, 24.1.1989, p. 16.
(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

- the taking up of the activity of an Information Society service, such as requirements concerning qualifications, authorisation or notification;

- the pursuit of the activity of an Information Society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.

(ii) The coordinated field does not cover requirements such as:

- requirements applicable to goods as such;

- requirements applicable to the delivery of goods;

- requirements applicable to services not provided by electronic means.

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

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given Information Society service if the following conditions are fulfilled:

(a) the measures shall be:

   (i) necessary for one of the following reasons:

      – public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;

      – the protection of public health;

      – public security, including the safeguarding of national security and defence;

      – the protection of consumers, including investors;
(ii) taken against a given 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) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate;

- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility to proceed with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.
CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4
Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an Information Society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

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 of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services 1.

Article 5
General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

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

(c) the details 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 or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

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

- the professional title and the Member State where it has been granted;

- a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment ¹.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where Information Society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6
Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an Information Society service comply at least 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 permitted in the Member State where 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 clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.
Article 7
Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously 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 electronic 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 ensure that the use of commercial communications which are part of, or constitute, an Information Society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, 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 commercial communication in conformity with the rules referred to in paragraph 1.
3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close co-operation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10
Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

**Article 11**

**Placing of the order**

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

   – the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means;
– the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4 Liability of intermediary service providers

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 a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable 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 insofar 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.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

Article 13

Caching

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable 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 widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

Article 14
Hosting

1. Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

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

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.

Article 15
No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 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. Member States may establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.
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, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(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 trade, 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. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with point (a) of paragraph 1. Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.
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 the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant 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 court actions available under national law concerning Information Society services’ activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.
2. The Annex to Directive 98/27/EC shall be supplemented as follows:


Article 19
Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.
4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to Information Society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20
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.
CHAPTER IV
FINAL PROVISIONS

Article 21
Re-examination

1. Before ……… *, 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 legal, technical and economic developments in the field of Information Society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the Internal Market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the Internal Market principles to unsolicited commercial communications by electronic mail.

* Three years after the date of entry into force of this Directive.
Article 22
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before …… ∗. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, 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 23
Entry into force

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

∗ 18 months after the date of entry into force of this Directive.
Article 24
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
   The President

For the Council
   The President
Derogations from Article 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

– copyright, neighbouring rights, rights referred to in Directive 87/54/EEC \(^1\) and Directive 96/9/EC \(^2\) 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 8(1) of Directive 2000/..//EC \(^3\);

– Article 44(2) of Directive 85/611/EEC \(^4\);


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– the freedom of the parties to choose the law applicable to their contract;

– contractual obligations concerning consumer contracts;

– formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated;

– the permissibility of unsolicited commercial communications by electronic mail.
COUNCIL OF THE EUROPEAN UNION

Brussels, 2 March 2000 (03.03) (OR. fr)

Interinstitutional File:
1998/0325 (COD)

COVER NOTE

6660/00

LIMITE

ECO 42

CONSOM 7

CODEC 156

from : Mr Carlo TROJAN, Secretary-General of the European Commission

date of receipt : 29 February 2000

to : Mr Javier SOLANA, Secretary-General/High Representative

Subject : Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the Council Common Position on the proposal for a Directive on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)


CORRIGENDUM to DRAFT MINUTES

Subject: 2233rd Council meeting (Internal Market) held in Brussels on 7 December 1999

Item 13 on page 10 should read as follows:

13. **Amended proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Directives 97/7/EC and 98/27/EC**

   - Council conclusions
     13470/99 CONSOM 75 ECOFIN 261 CODEC 735
     + COR 1 (es)

   The Council adopted the conclusions as set out in the Annex to 13470/99 + COR 1 (es).
COUNCIL OF THE EUROPEAN UNION

Brussels, 5 May 2000 (11.05)
(OR. fr)

Interinstitutional File:
1998/0325 COD

8291/00
LIMITE
CODEC 339
ECO 109
CONSOM 36

INFORMATION NOTE

Subject: ADOPTION OF LEGISLATIVE ACTS AFTER SECOND READING BY THE EUROPEAN PARLIAMENT
– Outcome of the European Parliament's second reading
(Brussels, 3 and 4 May 2000)

I. VOTE

As no amendments to the Council's common position were tabled ¹, and in accordance with the procedure without debate (Rule 78 of the Parliament's Rules of Procedure), the President of the European Parliament declared the common position approved.

The text of the European Parliament's resolution is annexed to this note.

II. ADOPTION OF LEGISLATIVE ACTS AFTER SECOND READING BY THE EUROPEAN PARLIAMENT

Since the European Parliament has approved the Council's common position, the act in question is deemed to be adopted in accordance with that position, as provided for in Article 251(2)(a) of the EC Treaty.

After it has been signed by the President of the European Parliament, the President of the Council and the Secretaries-General of the two institutions, the act will be published in the Official Journal of the European Communities.

¹ Parliament adopted two amendments to its legislative resolution on the common position, but the text of the common position itself was not changed.
1. Legal aspects of electronic commerce


(Codecision procedure: second reading)

The European Parliament,

- having regard to the Council common position (14263/1/1999 – C5-0099/2000),
- having regard to its position at first reading 1 on the Commission proposal to Parliament and the Council (COM(1998) 586 2 - C4-0020/1999),
- having regard to the Commission's amended proposal (COM(1999) 427),
- having regard to Article 251(2) of the EC Treaty,
- having regard to Rule 78 of its Rules of Procedure,
- having regard to the recommendation for second reading of the Committee on Legal Affairs and the Internal Market (A5-0106/2000),

1. Approves the common position;
2. Notes that the act is adopted in accordance with the common position;
3. Instructs its President to sign the act with the President of the Council pursuant to Article 254(1) of the EC Treaty;
4. Instructs its Secretary-General duly to sign the act and, in agreement with the Secretary-General of the Council, to have it published in the Official Journal of the European Communities;
5. Asks the Commission to ensure rapid and rigorous implementation of this Directive in the Member States and in particular, with respect to the liability of intermediary service providers, to encourage the establishment of efficient notice and take-down procedures by interested parties and to prevent any interpretation of Articles 12 to 15 which would call into question the balance achieved in those articles;
6. Asks the Commission to present initiatives providing guidance for the elaboration of codes of conduct which will ensure in particular the participation, where appropriate, of associations of consumers and Internet users;
7. Instructs its President to forward its position to the Council and Commission.

1 OJ C 279, 1.10.1999, p. 389.