

Services in the Information Society

Services in the Information Society

A commentary on the EC-Directive on Electronic Commerce

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This article deals with the European regulatory framework of Information Society Services in the EC. Offered mainly, but not only, over the internet, these services demand specific rules on issues as varied as the establishment of service providers, conclusion of contracts and liability of service providers, which the general Community Law on services could not provide. The European Commission has now published the Amended Proposal for a Directive on certain legal aspects of electronic commerce in the internal market. The article discusses and explains the rules laid down in this directive.

I. E-commerce: a description

The 'long-promised future of digital interactive everything'¹ is about to arrive. Whereas in the US the keyword concerning new service possibilities created by the internet and similar online-services has been the 'information superhighway'², in the EC the more socio-political term 'Information Society'³ has been framed, to indicate the involvement of all sectors of society, not least merely economic players. Business in the information society is referred to as e-commerce. E-commerce can be defined as 'any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact'⁴. However, this is far from all there is to e-commerce. The electronic interaction is merely a means to an end. Digitalisation and the ensuing possibility of electronic interaction will have a pervasive impact on highly diverse aspects of our life and on all levels of business. Not all new services involve the internet, but a lot of them do, and the internet is becoming increasingly ubiquitous. Even without referring to future services⁵, and merely considering the new digital services already available include eg. the possibility of listening to the radio from all over the world on the internet⁶, PC- and Internetbanking, the participation in auctions as buyer or seller⁷, the downloading of music for free or as a purchase (e.g. via a download which cannot be copied), Universal Messaging Services (i.e. the reception and transmission of faxes, SMS etc. via e-mail)⁸, watching TV news live⁹ and as archive on the internet¹⁰.

Most importantly, buying and selling of products and services over the net is increasing. Buying and selling of products over the internet is possible in two ways. First, there is the possibility that products and services are

distributed directly on the internet. This is known as direct electronic commerce. Examples are software, software updates music, and support. The product (Software) or the service (Good Advice on how to deal with it) is available in digital form only. Even less computer-centred products and services can be offered on the net – the European Commission has a virtual press desk e-mailing the latest news, pictures and videos can be downloaded for magazines and news¹¹.

In the second kind of retailing of products and services over the internet, real-life products and services are being sold over the net. This is known as indirect electronic commerce and two groups of retailers are involved. On the one side, there are the 'virtual' companies which have sprung up on the internet, hoping to save on overheads and thus supposedly being able to price competitively. For virtual retailers, barriers of entry are as low as they can be. On the other side, by now 'brick and mortar retailers' have been heeding the call of the internet. The retailer Wal-Mart¹², the publisher Bertelsmann¹³ and others are moving to the net. Virtual and real companies have recently joined forces in a Global Business Dialogue to make business over the internet easier¹⁴.

II. The Development of Rules

The digital revolution will have to be followed by a digital evolution. Andy Grove, of Intel, a computer-chip-producer, put it slightly more bluntly when he stated that it is time for business to adapt or die¹⁵. This applies in varying degrees to all sectors of society, not only to business. Governments from all over the world have initiated unilateral¹⁶, bilateral¹⁷, and multilateral projects (UNCITRAL¹⁸, the WTO¹⁹, the ITU²⁰, and the OECD²¹) on how to establish and adapt the regulatory environment.

In the EC, the Commission has issued the communication 'A European initiative in electronic commerce'²² identifying the crucial issues of the electronic commerce as ensuring access to the global marketplace²³, creating a favourable regulatory framework by the year 2000²⁴ and promoting a favourable business environment²⁵. These issues have been subsequently endorsed by the European Parliament²⁶. In order to create the favourable regulatory framework identified as necessary, a multitude of legal acts have been adopted or initiated. Already adopted are directives on data protection²⁷, in the field of legislative transparency²⁸, and in the field of legal protection for conditional access services²⁹.

Still in the process of legislation are directives in the fields of distance selling of financial services³⁰, electronic money³¹, electronic signatures³², and Intellectual Property rights³³.

Furthermore, a discussion has been initiated on a general framework for the converging sectors of telecommunications, media and information technology³⁴ and on the rules concerning indecent content on the internet³⁵.

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A major push towards a harmonised legal framework for the Information Society will be the adoption of the 'Directive on certain legal aspects of electronic commerce in the internal market'³⁶. The Commission proposal incorporating most of the amendments of the European Parliament was published on September 1st 1999. According to the time-limits of Art. 251 EC-Treaty, the adoption of the directive should be expected for the first half of next year. Implementation is then to be undertaken within one year of the adoption of the directive.

III. The E-commerce Directive

1. Scope of the directive

The directive focuses on the proper functioning of the internal market, particularly the free movement of Information Society services between the Member States³⁷. In order to achieve this, the Directive approximates 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 co-operation between Member States³⁸. Until an international regulatory framework is established, the Directive only covers service providers who are established in a Member State.

2. Information Society Services

Information Society services are defined as 'any service, provided at a distance, by electronic means and at the individual request of a recipient of services'³⁹.

This definition was taken from the directive laying down a procedure for the provision of information in the field of technical standards and regulations⁴⁰. The new directive uses the same definition to point out that the definition is part of the *acquis communautaire* of the EC. The understanding of the term 'service' in the e-commerce directive is the same as in general Community law. The definition of an Information Society service therefore does not require a payment by the recipient. The European Court of Justice has ruled that the concept of a service 'normally provided for remuneration' (Art. 50 EC) does not make reference to specific means of financing a particular service. Therefore, for an activity to constitute a service in the meaning of the EC-Treaty, and within the meaning of the e-commerce directive, it is not necessary for 'the service to be paid for by those for whom it is performed'⁴¹. The decisive factor is that it is remunerated in some way⁴². The fact that an activity has an 'economic character' or that there is 'consideration'⁴³ suffices. That ensures that the typical internet service, e.g. a search machine, which is free for the user, and

paid for by banner advertisements, is included in the definition of a service⁴⁴.

For the purpose of the definition of an Information Society Service, 'at a distance' means that the service is provided without the parties being simultaneously present. This excludes services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices. Examples for services excluded are medical examinations or treatment at a doctor's surgery using electronic equipment where both the doctor and the patient are physically present, the consultation of an electronic catalogue in a shop with the customer on site, a plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers, and electronic games made available in a video-arcade where the customer is physically present.⁴⁵

'By electronic means' means that the 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. This refers to direct e-commerce as defined in I, and excludes services having material content, even though provided via electronic devices. These may be automatic cash or ticket dispensing machines (banknotes, rail tickets), 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. Furthermore, 'by electronic means' excludes off-line services like the distribution of CD-ROMs or software on diskettes. Finally, 'by electronic means' excludes Services which are not provided via electronic processing/inventory systems, for example normal voice telephony services, traditional telefax/telex services, and services provided via voice telephony or fax like the telephone/telefax consultation of a doctor or a lawyer.⁴⁶

'At the individual request of a recipient of services' means a service provided through the transmission of data on individual request. This ties in with the TV-directive which excludes services 'at individual demand' from its scope.⁴⁷ This criterion excludes all services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (so-called point to multipoint transmission). This excludes, for example, television broadcasting services (including near-video on-demand services)⁴⁸, radio broadcasting services and (televised) teletext⁴⁹. It also excludes re-broadcasting of traditional TV-programmes⁵⁰ on the internet when the re-broadcasting solely represents an additional means of transmitting an integral or unaltered set of television programmes which have been broadcast over the airwaves, by cable or by satellite⁵¹.

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3. Commercial Communications

As a sub-category of Information Society Services, commercial communications⁵² are defined in Art. 2 e-commerce-directive as '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.' Some kinds of communications are excluded from the definition of commercial communications.⁵³ The broad definition is supposed to avoid problems created by the differentiation between sponsoring and advertising. Art 6 e-commerce-directive lays down specific rules for commercial communications. A commercial communication has to be clearly identifiable as such. Furthermore, the natural or legal person on whose behalf the commercial communication is made has to be clearly identifiable. If promotional offers, such as discounts, premiums and gifts, are allowed for in the Member State where the service provider is established, commercial communications concerning such a discount, have to be clearly identifiable as such. Furthermore, the conditions to be met to qualify for them must be easily accessible and must be presented accurately and unequivocally. If promotional competitions or games are allowed for in the Member State where the service provider is established, they have to be clearly identifiable. On top of that, the conditions for participation have to be easily accessible and to be presented accurately and unequivocally.

A major problem in the context of commercial communication is unsolicited commercial communication by electronic mail⁵⁴ known as 'spam'. Unsolicited commercial communication by electronic mail must be clearly and unequivocally identifiable as such as soon as the recipient receives it.⁵⁵ Furthermore, the European Parliament has insisted on opt-out registers, where those not wanting to receive unsolicited commercial communications can register themselves.⁵⁶ Member States have to ensure that service providers regularly consult and respect these opt-out registers. Furthermore, individual Member States can subject unsolicited commercial communication to stricter rules.⁵⁷

There is uncertainty as to how far regulated professions can make use of the internet to promote their services. Broadly speaking, regulated professions are those who demand for the taking up or pursuit the possession of a diploma which shows that the holder has successfully completed a post-secondary course of at least three years' duration⁵⁸, e.g. accountants, lawyers or engineers. Often, these professions have to follow special rules on commercial communications. Therefore the directive states that the Member States have to lay down 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 met⁵⁹.

4. Services not covered by the directive

There are a number of general exceptions to the e-commerce-directive. Taxation is excluded, as the fiscal aspects of electronic commerce are under review in a separate work launched by the Commission in its Communication 'Electronic commerce and indirect taxation'⁶⁰. Also excluded is the field covered by the data-protection directive⁶¹, because of the possible overlap of the area covered by the data-protection directives and the e-commerce-directive.

Furthermore, the activities of notaries, the representation of a client and defence of his interests before the courts and gambling activities not carried out for commercial communications purposes⁶² have been excluded from the application of the directive. Here, the Commission considers that the lack of mutual recognition or sufficient harmonisation is such that it is not possible to guarantee the freedom to provide services between Member States, because an equivalent level of protection of general interest objectives cannot be guaranteed.

IV. Establishment

1. Definition

Service providers are defined as 'any natural or legal person providing an Information Society service'⁶³. Service providers therefore include natural and legal persons, and in the case of legal persons, all forms of company are included. 'Established service provider'⁶⁴ is 'a service provider who effectively pursues an economic activity using a fixed establishment for an indeterminate duration'. On the other hand, the mere presence and use of the technical means and technologies required to provide the service does not constitute an establishment of the provider. Formal criteria (a mere letter-box) or technology (establishment of technical means, etc.) have been avoided as the Commission considered that these formal criteria would all too readily enable operators to evade supervision. The definition is based on the case law of the ECJ, which has ruled that 'The concept of establishment within the meaning of [now] Article 43 et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'⁶⁵, employing qualitative criteria concerning the actual nature and stability of the economic activity. The ECJ has ruled that one and the same operator can be established in several Member States. In the context of television, the Court has ruled that when several establishments belonging to the same TV broadcasting organisation exist, the Member State with supervisory powers shall be the one where this organisation has the 'centre of its activities'⁶⁶. This rule applies to Information Society Service Providers as well. Therefore, the location of the technology used, e.g. the renting of web space for the hosting of web pages does

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not constitute an establishment on the territory of a Member State, nor does the ability to access an internet site in a Member State. Finally, nor does the fact that a service provider established in another Member State offers services targeted at the territory of another Member State constitute an establishment.

The provision of Information Society Services may not be subject to prior authorisation⁶⁷. Exceptions apply for authorisation schemes not directed at Information Society Services as such, i.e. the provision of a service over the net which would necessitate an authorisation outside the internet, and for the provision of telecommunication services⁶⁸.

2. Internal Market

The definition of a service provider's place of establishment is especially important because the directive lays down the application of the internal-market-principle or the country-of-origin principle for Information Society services (Art. 3 e-commerce directive). The directive uses the term 'co-ordinated field' of the directive, to delineate the extent of its application. This 'co-ordinated' field is defined as the requirements applicable to Information Society Service providers and Information Society services⁶⁹. The term is supposed to ensure the 'horizontal' approach of the directive, covering all issues related to Information Society Services. Each Member State is to ensure that the Information Society services provided by a service provider in their territory complies with the national provisions applicable which fall in the directive's 'co-ordinated field'. Services offered lawfully in one Member State must not be unduly restricted in another Member State⁷⁰. The usual exceptions have been laid down specifically⁷¹. Thus, restrictions by Member States where the service provider is not established can be taken, only if they are necessary for public policy reasons. In particular these include 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, i.e. under the usual precondition for the restriction of one of the freedoms granted by the EC-treaty. This measure has to be taken against an Information Society service which prejudices these objectives or which presents a serious and grave risk of prejudice to those objectives. Furthermore, such measures can only be taken after the Member State where the provider is established has been asked in vain to take measures, and the measures must be notified to the Commission.

The Country-of-Origin Principle, i.e. the rule that services are only governed by the law of the country where the provider is established, does not apply to a couple of services exempted in the directive. Besides unsolicited commercial communications via e-mail mentioned already, further important exemptions⁷² are copyright, (as well as rights referred to in Directive

87/54/EEC⁷³ and Directive 96/9/EC⁷⁴), intellectual property rights, some kinds of transferable securities⁷⁵, some kinds of insurance⁷⁶ and others⁷⁷, and last but not least, contractual obligations concerning consumer contracts. In all these cases, Member States can restrict the free movement of services according to the general rules on that restriction, i.e. on grounds of public policy, public security or public health (Art. 55 EC and Art. 46 EC). These exemptions have been excluded because either it was deemed impossible to apply the principle of mutual recognition as set out in the case-law of the Court of Justice concerning the principles of freedom of movement enshrined in the Treaty. Also, in some areas mutual recognition seemed unachievable with insufficient harmonisation to guarantee an equivalent level of protection between Member States. And finally, for some of these exemptions, there are provisions laid down by existing Directives which are clearly incompatible with Article 3 because they explicitly require supervision in the country of destination⁷⁸.

3. Rules on Information to be given

In the interest of the consumers and the business partners, somebody offering Information Society services, has to render easily accessible, in a direct and permanent manner, to their recipients and competent authorities, the following information (Art. 10 e-commerce-directive):

- (1) the name of the service provider;
- (2) the address at which the service provider is established;
- (3) 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.

Furthermore, where the service provider is registered in a trade register, information on the trade register in which the service provider is entered and his registration number on that register have to be provided. Additionally, 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 have to be provided. Members of regulated professions have to inform about 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. Finally, where the service provider undertakes an activity that is subject to VAT, the VAT number under which he is registered with his fiscal administration must also be provided. On top of all the information about the service provider, it is stated that prices of Information Society services are to be indicated

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accurately and unequivocally and must include all additional costs.

The rule on prices is straightforward. More doubtful is the amount of information request from Information Society Service providers. Apart from technical problems, e.g. that the professional rules of the regulated professions tend to change⁷⁹, it could appear that the information rules put more requirements on a provider of Information Society Services than on a real life service provider. Yet, on the other hand, the consumer in the virtual shopping mall is in a special situation, so getting that much information on the contractual partner is bound to increase consumer confidence.

V. Contracts

1. Conclusion of Contracts

Another virulent problem is the conclusion of contracts by electronic means. In order to encourage this, the directive stipulates that Member States are to ensure that their legislation allows contracts to be concluded electronically⁸⁰. To achieve this, Member States are to 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. However, Member States may lay down that electronic conclusion is not possible for contracts requiring the involvement of a notary, contracts which, in order to be valid, are required to be registered with a public authority, or contracts governed by family law and contracts governed by the law of succession⁸¹.

To ensure the provision of the necessary information about the other contracting party, and about the conclusion of the contract, the directive stipulates that 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 includes, in particular, the different stages to follow to conclude the contract, and the expedients for correcting handling errors⁸². Finally, the contract terms and general conditions provided to the consumer have to be made available in a way that allows the consumer to store and reproduce them⁸³.

As different legal traditions have different means of determining the moment at which a contract is concluded, it is obvious that these traditions can clash when contracts are concluded via electronic means. So even though it is an intrusion in the legal traditions of the Member States, it is laudable that the Commission has put down uniform criteria for the conclusion of contracts. According to Art. 11 e-commerce-directive, the contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance.

One consequence is the implicit abolition of a maxim known as *invitatio ad offerendum*. E.g. in Germany, traditionally, a catalogue has not been regarded as a legally binding offer, but merely as an invitation to make an offer. Now, the wording of the directive makes the catalogue – e.g. a website – the offer. At first glance, the legal implications seem to be minor: After all, the internet shop owner could merely decline the confirmation of the acceptance – i.e. not send an e-mail that he has received the order, to avoid contractual obligations. However, this leaves the possibility of quasi-contractual obligations, e.g. known as *culpa in contrahendo*. The website constitutes the offer, but the service provider is required by the directive to immediately confirm the acceptance of the receipt⁸⁴.

2. Applicable Law

As far as the applicable law is concerned, the directive stipulates that it does not want to establish specific rules on private international law relating to conflicts of law. Therefore, as far as the rules on contracts are concerned, the question as to whether a Member State's law applies is decided by virtue of its rules of international private law⁸⁵. This is problematic. After all, on the one hand side the consumer usually has neither the knowledge nor the means to evaluate the rules of international private law of the Member State where the service provider is established. On the other hand, the service provider might encounter the problem the directive was meant to solve – for some activities, the knowledge of all 15 Member States' laws might be necessary⁸⁶. It is not surprising, then that the issue "Applicable Law" will have a public hearing on 4/5 November of this year in Brussels⁸⁷. A possible result could be the strengthening of the country of origin principle excluding the rules of international private law in so far as they result in the application of a law other than that of the country where the service provider is established.

VI. Liability

1. Principle: Liability reduced

There is considerable legal uncertainty within Member States as to the extent to which providers of Information Society Services are liable for content. The European rules follow the German example⁸⁸ in creating exemptions to liability. The liability regime deals only with services where the Service providers merely act as 'intermediaries', when they transmit or host third party information, i.e. activities where the information is provided by recipients of the service and the information is transmitted or stored at the request of recipients of the service. The adoption of the rules on liability are only compulsory for the Member States for Information Society services and therefore for services normally

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provided for remuneration. Hopefully, the Member States will not make this distinction when implementing the directive, as there is no point in having a stricter regime for providers of free services, i.e. universities, or private homepages.⁸⁹

Due to the horizontal effect of the directive, limitations to liability are established for all types of illegal activities initiated by third parties online (e.g. copyright piracy, unfair competition practices, misleading advertising, etc.). The exemption from liability does not include prohibitory injunctions. The directive does not lay down new rules for the liability itself, only for the exemptions. If a service provider is not covered by an exemption, the normal liability regime of the relevant Member State applies. The exemptions to liability are established according to the quality of a service provider's acts, not the general nature of his business. The services that are dealt with in the directive are called *mere conduit*, *hosting* and *caching*.⁹⁰

2. Mere Conduit, Hosting, Caching

a) Mere Conduit

In Article 12 e-commerce-directive, the term *mere conduit* is used to refer to acts of transmission of information in communication networks where the service provider plays a passive role as a conduit of information for third parties, the recipients of the service. This is the case when the provider does not initiate the transmission, does not select the receiver of the transmission, and does not select or modify the information contained in the transmission.

The requirement that the provider does not initiate the transmission means that the provider is not the person who makes the decision to carry out the transmission. This is not the case when a provider automatically initiates a transmission at the request of a recipient of his service. Obviously, a transmission of information from the computers of the provider cannot happen without at least the provider's computers at one point giving their 'consent'.

The requirement that the provider does not select the receivers of the transmission does not imply that the provider is disqualified from the exemption in the case of the selection of receivers as an automatic response to the request of the person initiating the transmission (e.g. a user's request to have an e-mail forwarded to a mailing list broker).⁹¹ *Mere conduit* covers both the access to information, and the access to a communication network. These services are also known as access provision and network provision⁹². In these cases the provider shall not be liable for the information transmitted. From a technical point of view, automatic, intermediate and transient storage of the information transmitted is included in this exemption, if this automatic, intermediate and transient storage takes place for the sole purpose of carrying out the transmission in the

communication network. This only applies when the information is not stored for any period longer than is reasonably necessary for the transmission. This liability exemption covers both the cases in which a service provider could be held directly and personally liable for an infringement, and cases in which a service provider is not directly liable, but could be considered secondarily liable for someone else's infringement. Whenever there is a case of *mere conduit*, claims for damages cannot be directed against the provider for any form of liability. Furthermore, the provider of a mere conduit-service cannot be subject to prosecution in a criminal case.

b) Caching

Art. 13 e-commerce directive defines *caching* as the automatic, intermediate and temporary storage of information, performed for the sole purpose of making more efficient the information's onward transmission to subsequent users of the service upon their request. The automatic, intermediate and temporary storage of information is the same criterion as included in the *mere conduit* exemption, however, as opposed to mere conduit, here the automatic intermediate and temporary storing of the information is used to allow subsequent users access to the information. Providers use *caching* to enhance the speed with which information can be accessed. In order to ensure that everybody can get the 'Starr-Report' or the Star-Wars-Trailer without unbearable download times, providers store identical copies on their own servers. The caching-exemption only applies under certain conditions that follow from the technical definition of *caching*. The provider must not modify the information, must comply with conditions on access to the information, must comply with rules regarding the updating of the information specified in a manner consistent with industrial standards, and the provider must not interfere with the technology, consistent with industrial standards, used to obtain data on the use of the information.

Finally, the provider has to act 'expeditiously' to remove or to bar access to the information upon obtaining actual knowledge that the information at the initial source of the transmission has been removed from the network; or access to it has been barred; or a competent authority has ordered such removal or barring.

c) Hosting

Hosting is defined in Article 14 e-commerce-directive as the storage of information provided by a recipient of the service, stored at the request of a recipient of the service. A provider of hosting is exempted from liability if the provider does not have actual knowledge that the activity is illegal. In so far as claims for damages are concerned, it is not necessary to have actual knowledge of the illegality. To claim damages, it is sufficient that the provider is aware of facts or circumstances from which the illegality

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of the activity is apparent. Furthermore, also here the provider has to act expeditiously to remove or to disable access to the information, if he gets to actually know that the activity is illegal, or becomes aware of the circumstances. This hosting-exemption does not apply when the recipient of the service is acting under the authority or the control of the provider.

This Commission hopes that the principle of general exemption of liability for hosts, combined with a duty to take down illegal information once having become or been made aware of its illegality, will provide a basis for procedures sometimes referred to as 'notice and take down procedures'. These are procedures where the service provider is notified about information that is the subject of illegal activity in order to obtain the removal or disablement of such information.⁹³

The hosting-exemption is problematic insofar as the actual knowledge of the illegality is necessary. In Germany, e.g., it is generally held that knowledge of the underlying facts, not of the ensuing illegality, is sufficient to constitute liability.⁹⁴ However, this is softened by the fact that for damages claims, the awareness of the underlying facts or circumstances from which illegality of the activity is apparent suffices.

d) no obligation to monitor

Finally, the directive stipulates that no general obligation should be imposed on providers to screen or to actively monitor third party content⁹⁵. This is especially important as such monitoring is close to impossible and would, where attempted, lead to huge costs. Of course, this exemption does not cover requests by courts or law enforcement agencies that a provider is to monitor, for instance, a specific site during a given period of time, in order to prevent or to fight a specific illegal activity.

VII. Settlement of Disputes

1. Out-of-court dispute settlement

The ECJ has established that access to justice is a corollary of the freedoms of the area without internal frontiers⁹⁶. In cases concerning e-commerce, relief might be needed fast in some cases, but in other cases, the sums involved might be too small to encourage court action. Therefore, the directive asks for the establishment of effective out-of-court-schemes for dispute settlement in the event of disagreement between an Information Society service provider and its recipient⁹⁷, possibly by electronic means. For out-of-court cases concerning so-called consumer disputes, the directive lays down principles to be adhered to in out-of-court dispute settlement. Bodies responsible for the out-of-court settlement of consumer disputes are to abide by Community law and to apply the principles of independence and transparency, of adversarial techniques, procedural efficacy, legality of the decision, and freedom of the parties and of representation⁹⁸.

In order to achieve a certain flow of information on these decisions, the Member States are to 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.

2. In court

The directive stipulates that Member States are to ensure that effective court actions can be brought against Information Society services' activities. One of the means by which rapid court actions are to be ensured is to allow the rapid adoption of interim measures designed to remedy any alleged infringement and to prevent any further impairment of the interests involved. As the directive is not supposed to establish rules of private international law relating to jurisdiction⁹⁹, a clear rule on jurisdiction is still needed. Acts in breach of the national provisions of the rules of Art. 5 to Art.15 e-commerce-directive which affect consumers' interests are subject to injunctions for consumers' interests by consumer groups¹⁰⁰.

VIII. Further Rules

The Commission is actively encouraging industry self-regulatory systems, including the establishment of codes of conduct and hotline mechanisms¹⁰¹. The Commission and the Member States are to encourage the drawing-up of codes of conduct at Community level, including codes of conduct regarding the protection of minors and human dignity, by trade and professional associations or organisations designed to contribute to the proper implementation of Articles 5 to 15. The draft codes of conduct at national or Community level are to be transmitted to the Commission so that the latter may examine their compatibility with Community law. These codes of conduct are to be made accessible in the Community languages by electronic means. Professional and consumer associations or organisations are to assess the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce¹⁰².

There are further rules dealing with the co-operation between Member States' authorities and the Commission. Each Member State is to designate a contact person for co-operation with the Commission, and each Member States has to establish contact points which shall be accessible electronically within their administration. At these contact points, recipients and service providers can obtain information on their contractual rights and obligations, 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 receive assistance in the event of disputes.¹⁰³

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A couple of unsolved issues as liability of providers of hyperlinks and location tool services, notification requirements and the attribution of liability following the taking down of content remain to be solved. In order to do so, the Commission shall submit a report on the application of this directive, no later than three years after the adoption of the directive, and then every two years.¹⁰⁴

IX. Evaluation

All in all, though there is still room for improvements, especially as far as the rule on applicable law is concerned, the directive is a major step towards a framework creating legal security for electronic commerce. Especially the highly liberal establishment rules and the liability regime provide legal certainty for businesses and consumers in Europe. Contrary to previous experiences, moving a business to the EC might now be well recommended, and not just to avoid negative consequences of being outside the EC (as was the case e.g. in the time of the so-called 'Screwdriver regulation'¹⁰⁵). As the e-commerce-directive only applies to Service providers established in the European Community, a move to the European Community for players from countries having less favourable rules for e-commerce services will have positive consequences¹⁰⁶. The provision of services in the Information Society, where the market is global, needs the rules to be as widely harmonised as possible, to ensure they will flourish. With further amendments, the e-commerce-directive could be a role model for future rules laid down in multilateral agreements.

- 1 The Economist, Beware the Gatekeeper, 1 May 1999, p. 16.
- 2 A phrase coined by Al Gore, cf. The Economist, 22 July 1995.
- 3 COM(97)7 of 22 January 1997. Cf. e.g. Council Resolution of 19 January 1999 on the Consumer Dimension of the Information Society (1999/C 23/01), Preamble, par. 1 and 2.
- 4 European Commission- DG XIII, Electronic-Commerce – an Introduction, 1997 (last updated on 2 July 1998), available at <http://www.ispo.cec.be/ecommerce/answers/introduction.html>
- 5 A possible future service could video on demand via phone lines, cf. Ultimate Telly, The Economist, 11 September 1999, p. 74 f.
- 6 For an overview of international radio-stations available on the internet, go to <http://www.live-radio.net/radio.shtml>
- 7 E.g. <http://www.ricardo.com>
- 8 E.g. offered by GeoNet via <http://www.strato.de/webmessaging/>
- 9 E.g. <http://www.cnn.com>
- 10 E.g. the main German news, <http://www.tagesschau.de>
- 11 For Germany, this can be contacted at eu-kommission@news-room.de
- 12 <http://www.wal-mart.com/>
- 13 <http://www.bol.de>
- 14 The Global Business Dialog on Electronic Commerce (GBDe) met on 13 September 1999 in Paris (<http://www.gbde.org>) in order to facilitate the growth of e-commerce by helping governments and international trade organisations to overcome differences in laws and regulation. Participants were e.g. America Online Inc, DaimlerChrysler AG, IBM Corp, Time Warner Inc and Toshiba Corp.
- 15 Quoted after: Caught in the web, The Economist, 17 July 1999.

- 16 Germany passed legislation: On one side the federal government with the Information and Communication Services Act, the IuKDG, <http://www.iid.de/iukdg/iukdgc.html>. On the other the Länder with the Media State Treaty, the MDStV, <http://www.iid.de/iukdg/mdstv.html>. On the confusion created by parallel legislation on different levels, cf. Koenig/Röder, Converging Communications, Diverging Regulators – Germany's Constitutional Duplication in Internet Governance, IJCLP 1/1999, http://www.digital-law.net/IJCLP/1_1998/ijclp_webdoc_1_1_1998.html. Other EC-countries are about to legislate or considering legislation. At the time of the tabling of the Commission's proposal, Belgium, France, Finland, Italy, and the Netherlands had initiated the adaptation of their existing rules, Austria, France, Italy, the Netherlands, Sweden, the UK, and Belgium were pondering new rules for specific problems.
- 17 A safe-harbour agreement with the US is still being negotiated, cf. The Economist, 9 January 1999. David Aaron, US Under Secretary of Commerce for International Trade, has expressed optimism, at a press meeting, 17 September 1999, that the US and EU will reach agreement before the end of the year, <http://www.idg.net/idgns/1999/09/17/USEnvoyEUDDataPrivacy-Deal.shtml>.
- 18 UNCITRAL has established a working group on electronic commerce, http://www.uncitral.org/english/sessions/wg_ec/index.htm#TOP. As a move into applied e-commerce, UNCTAD has established the UNCTAD Trade Point Development Center, which is working with Electronic Trading Opportunities, cf. <http://www.untpdc.org/untpdc/>.
- 19 The General Council of the WTO has established a work programme on electronic commerce on 30 September 1998 which is currently being followed through, cf. http://www.wto.org/wto/ecom/e_gc.htm
- 20 Cf. e.g. The Role of the International Telecommunication Union (ITU) in the Development of Electronic Commerce, Geneva, 16 September 1999, at <http://www.itu.org/> at document 22129.
- 21 Overview of relevant OECD work at http://www.oecd.org/subject/electronic_commerce/documents/overvieworig.htm
- 22 A European initiative in electronic commerce, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, (Initiative), COM(97) 157 final, 16.4.1997.
- 23 Initiative, fn. 22, p. 8 ff.
- 24 Initiative, fn. 22, p. 12 ff.
- 25 Initiative, fn. 22, p. 20 ff.
- 26 European Parliament Resolution A4-0173/98 on the Communication from the Commission on 'A European Initiative on Electronic Commerce', 14 May 1998.
- 27 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 (Data-Protection-Directive), OJ L 281, 23/11/1995 p. 0031–50.
- 28 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, OJ L 204, 21/07/1998 p. 0037–48 amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (Transparency directive), OJ L 217, 05/08/1998 p. 0018–26
- 29 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 (Conditional Access Services Directive), OJ L 320, 28/11/1998 p. 0054–7.

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- 30 Amended proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, COM (1998) 468 final of 26 July 1999.
- 31 Proposal for a European Parliament and Council Directive on the taking up, the pursuit and the prudential supervision of the business of electronic money institutions (*Electronic-money-institutions-Directive*) (98/C 317/06) COM(1998) 461 final - 98/0252(COD), submitted by the Commission on 21 September 1998.
- 32 Proposal for a European Parliament and Council Directive on a common framework for electronic signatures - COM (1998) 297 final of 13 May 1999.
- 33 Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM (1999) 250 final of 21 May 1999.
- 34 Green paper on the Convergence of the telecommunications, media and information technology sectors, and the implications for regulation (COM(97)623)
- 35 Green Paper on the Protection of Minors and human dignity in audio-visual and information services, To be retrieved at <http://www2.echo.lu/legal/en/internet/gpen-toc.html>. This Green Paper led to the Decision 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks; OJ L 033 , 06/02/1999 p. 0001-0011
- 36 Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market COM (1999) 427 final of 1 September 1999 (*e-commerce directive*).
- 37 Art. 1 (1) *e-commerce-Directive* (fn. 36).
- 38 Art 1 (2) *e-commerce-Directive* (fn. 36).
- 39 Art. 2 (a) referring to Article 1(2) of the *Transparency directive*, (fn. 28).
- 40 Article 1(2) of the *Transparency directive*, (fn. 28). The definition has already been cited in Art. 2 (a) of the *Conditional Access Services Directive* (fn. 29).
- 41 *Bond von Averteerders*, Case C-352/85 [1988] E.C.R. 2085 par. 16.
- 42 Cf. the opinion of Advocate General Warner at p. 876 in *Debauxe*, Case 52/79 [1980] E.C.R. 833, and *Coditel* Case 62/79 [1980] E.C.R. 881 and Wyatt/Dashwood, European Community Law(1993), p. 303.
- 43 Case C-109/92, par. 15.
- 44 Maennel, Elektronischer Geschäftsverkehr, MMR 1998, p. 187 f.
- 45 Annex V (1) *Transparency Directive*, (fn. 28).
- 46 Annex V (2) *Transparency Directive*, (fn. 28).
- 47 Article 1(a) of Directive 89/552/EC, Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (*TV-Directive*), OJ L 298 , 17/10/1989 p. 0023 - 0030 amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC OJ L 202 , 30/07/1997.
- 48 As defined in Art. 1 (a) *TV-Directive*, (fn. 47).
- 49 Annex V (2) *Transparency Directive*, (fn. 28).
- 50 As defined in Article 1(a) of the *TV-Directive*, fn. 47
- 51 Explanatory Memorandum to the original draft of the *e-commerce-directive*, COM (1998) 586 final, 98/0325 (COD), p. 19.
- 52 Art. 2 *e-commerce-directive* (fn. 36).
- 53 Art. 2 *e-commerce-directive* (fn. 36) excludes information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address, and communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, in particular without financial consideration.
- 54 Art. 7 *e-commerce-directive* (fn. 36).
- 55 Art. 7 (1) *e-commerce-directive* (fn. 36).
- 56 Art. 7 (2) *e-commerce-directive* (fn. 36) has been added.
- 57 Art. 22 (2) read together with Annex II *e-commerce-directive* (fn. 36).
- 58 This term stems from Art. 1 of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 019 , 24/01/1989 p. 0016 - 0023.
- 59 Art. 8 *e-commerce-directive* (fn. 36).
- 60 COM(1998) 374 final.
- 61 Art. 3 (1) *Data-Protection-Directive* (fn. 27), 'The processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system'.
- 62 Art. 22 and Annex I *e-commerce-directive* (fn. 36).
- 63 Art. 2 (b) *e-commerce-directive* (fn. 36).
- 64 Art. 2 (c) *e-commerce-directive* (fn. 36).
- 65 *Factortame*, Case C-221/89 [1991] ECR I-3905, paragraph 20.
- 66 *VT4 Ltd*, Case C-56/96, [1997] ECR I-3143, paragraph 19.
- 67 Art. 4 *e-commerce-directive*.
- 68 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 OJ L 117 , 07/05/1997 p. 0015 - 0027
- 69 Art. 2 (f) *e-commerce-directive* (fn. 36).
- 70 Art. 3 (2) *e-commerce directive* (fn. 36).
- 71 Art 22 (3) *e-commerce directive* (fn. 36).
- 72 Art. 22 (2) and Annex II *e-commerce directive* (fn. 36).
- 73 Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products; OJ L 24, 27.1.1987, p. 36.
- 74 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; OJ L 77, 27.3.1996, p. 20.
- 75 Those referred to in Article 44 (2) Council Directive 85/611/EEC of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertaking for collective investment in transferable securities (UCITS), OJ L 375, 31.12.1985, p. 3, as last amended by Directive 95/26/EC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).
- 76 Article 30 and Title IV of Council Directive 92/49/EEC of 18 June 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) OJ L 228, 11.8.1992, p. 1, as amended by Directive 95/26/EC.
Title IV of Council Directive 92/56/EEC of 10 November 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct life insurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), OJ L 360, 9.12.1992, p. 1, as amended by Directive 95/26/EC.
Art. 7 and 8 of the Second Council Directive 88/357/EEC of 22 June 1988 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ L 172, 4.7.1988, p. 1, as last amended by Directive 92/49/EC.

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- Art. 4 of Council Directive of 8 November 1990 on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ L 330, 29.11.1990, p.50, as amended by Directive 92/96/EEC.
- 77 The emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in of the electronic-money-Directive Article 7(1) *Electronic-money-institutions-Directive* (fn. 31).
- 78 Explanatory Memorandum (fn. 51).
- 79 Hoeren, Richtlinienvorschlag zum E-Commerce, MMR 1999, p.192, at p.196.
- 80 Art. 9 (1) e-commerce-directive (fn. 36).
- 81 Art. 9 (2) e-commerce-directive (fn. 36). According to Art. 9 (3) *e-commerce-directive* (fn. 36), Member States are to submit to the Commission a complete list of the categories of contracts covered by the derogations provided for in paragraph 2. The previous possibility of the list of categories of contract provided for in paragraph 2 to be amended by the Commission in accordance with the procedure laid down in Article 23 has been deleted due to the amendments of the European Parliament.
- 82 Art. 10 e-commerce-directive (fn. 36).
- 83 Art. 10 *e-commerce-directive* and Art. 11 (2) (fn. 36).
- 84 Art. 11 (1) *e-commerce-directive* (fn. 36).
- 85 Recital 7 and Art. 3 (3) *e-commerce directive* (fn. 36).
- 86 European law threatens e-commerce growth, Reuters News September 10 1999, 10:45 a.m. PT quoting Dirk Hudig, UNICE's secretary-general, <http://news.cnet.com/news/0-1007-200-116516.html?tag=st.cn.1fd2>.
- 87 This item will have a public hearing in Brussels on 4 and 5 November of this year.
- 88 cf. Koenig/Röder/Loetz, The Liability of Access Providers, IJCLP 3, 1999
- 89 Spindler, Verantwortlichkeit nach der E-commerce-Richtlinie, MMR 1999, p. 199 at p. 200.
- 90 The Commission avoids the less technical approach of the German rules, Art. 5 TDG, this is positive; similarly Holznapel/Holznapel, Zukunft der Haftungsregeln für Internetprovider, K & R p. 103, 104.
- 91 Explanatory Memorandum (fn. 51), p. 28.
- 92 cf. Koenig/Röder/Loetz, The Liability of Access Providers, IJCLP 3, 1999, http://www.digital-law.net/IJCLP/3_1999/ijclp_webdoc_7_3_1999.html
- 93 Explanatory Memorandum (fn. 51), p. 29.
- 94 Spindler (fn. 89), p. 202
- 95 Art. 15 *e-commerce directive* (fn. 36).
- 96 cf. Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661.
- 97 Art. 17 *e-commerce directive* (fn. 36).
- 98 These principles stem from the Commission Recommendation 98/257/EC, adopted on 30 March 1998, on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, OJ L 115, 17 April 1998, p. 31. These principles are explained in the Commission Communication of 30 March 1998 on the out-of-court settlement of consumer disputes, COM(1998) 198 final.
- 99 Recital 7 e-commerce directive (fn. 36).
- 100 Art. 17 e-commerce directive (fn. 36) read together with Art. 1 (2) of the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests OJ L 166 , 11/06/1998 p. 0051 – 0055; Amended by Directive 99/44/EC (OJ L 171 07.07.99 p.12).
- 101 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions on an Action Plan on promoting safe use of the internet. Adopted by the Commission on 12 November 1997 (COM(97) 582).
Council Recommendation 98/560 of 24 September 1998 on the development of the competitiveness of the European audio-visual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity; OJ L 270, 7.10.1998, p. 48.
- 102 Art. 16 *e-commerce directive*, (fn. 36).
- 103 Art. 19 *e-commerce directive*, (fn. 36).
- 104 Art. 24 *e-commerce directive*, (fn. 36).
- 105 For details on the screwdriver-regulation, cf. Roeder, The 'Screwdriver-Regulation' and the GATT after the Uruguay Round (1995), <http://www.eunionlaw.de/dumping.html>.
- 106 Reporters Sans Frontières recently named twenty of these countries may be described as real enemies of the Internet because they control access totally or partially, have censored web sites or taken action against users. They are: the countries of Central Asia and the Caucasus (Azerbaijan, Kazakhstan, Kirghizia, Tajikistan, Turkmenistan and Uzbekistan), Belarus, Burma, China, Cuba, Iran, Iraq, Libya, North Korea, Saudi Arabia, Sierra Leone, Sudan, Syria, Tunisia and Vietnam. <http://www.rsfr.fr/uk/alaune/enemisweb.html>