



# **THE MEANING OF THE INFORMATION SOCIETY SERVICES IN THE E-COMMERCE DIRECTIVE**

**AUTHOR: Claudia Andrea Hernández Sánchez  
MASTER INFORMATION COMMUNICATION  
AND TECHNOLOGY**

**UNIVERSITY OF OSLO  
HØSTEN 2005**



## **INDEX**

### **CHAPTER 1 THE ECOMMERCE DIRECTIVE**

- 1.1 THE ECOMMERCE DIRECTIVE AND THE INFORMATION SOCIETY SERVICES
- 1.2 BACKGROUND HISTORY INFORMATION SOCIETY
- 1.3 SCOPE OF THE DIRECTIVE
- 1.4 ANALYSIS OF THE CONCEPT INFORMATION SOCIETY SERVICE UNDER THE TRANSPARENCY DIRECTIVE, CONDITIONAL ACCESS AND E-COMMERCE DIRECTIVE
  - 1.4.1 ANALYSIS OF THE CONCEPT UNDER THE TRANSPARENCY DIRECTIVE
  - 1.4.2 ANALYSIS OF THE CONCEPT UNDER THE CONDITIONAL ACCESS DIRECTIVE
  - 1.4.3 ANALYSIS OF THE CONCEPT UNDER THE E-COMMERCE DIRECTIVE

### **CHAPTER 2 CRITICS TO THE APPROACH OF INFORMATION SOCIETY SERVICES**

- 2.1. UNDERSTANDING OF THE FREE MOVEMENT OF SERVICE AND THE TERM SERVICE BY ITSELF
- 2.2 BORDERLINES OR DISTINCION BETWEEN INFORMATION SOCIETY SERVICES, TELECOMMUNICATION SERVICES AND BROADCASTING SERVICES SO CALLED "TRIPLE PAY"
  - 2.2.1 BROADCASTING SERVICES
  - 2.2.2 TELECOMMUNICATION SERVICES
- 2.3 COMPARISION BETWEEN TRADITIONAL AND ONLINE INFORMATION SOCIETY SERVICES
  - 2.3.1 E-HEALTH COMPARISION BETWEEN TRADITIONAL AND ONLINE INFORMATION SOCIETY SERVICES

### **CHAPTER 3 FINAL REMARKS**

- 3.1 WHAT IS AHEAD IN THE ISS FIELD? SOLUTIONS?
- 3.2 CONCLUTION

## **REFERENCES**

### **LIST OF JUDGEMENTS/DECISIONS**

### **INTERNATE WEBPAGES**

### **ANNEX: EXAMPLES FOR POINT 2.3 COMPARISION BETWEEN TRADITIONAL AND ONLINE INFORMATION SOCIETY SERVICES**

- (1) FINANCIAL SERVICES AND THE IMPACT IN INFORMATION SOCIETY SERVICE BY THE E-COMMERCE DIRECTIVE
- (2) AVERTISEMENT AND THE IMPACT IN INFORMATION SOCIETY SERVICE BY THE E-COMMERCE DIRECTIVE



## INTRODUCTION

**T**he adoption of the Directive on certain legal aspects of Information Society Services, in particular electronic commerce, in the Internal Market on 6th June 2000 (hereinafter E-commerce Directive') established a legal framework for electronic commercial services. The aim of the Directive is to clarify the information society in such a way that will ensure legal certainty and forge consumer confidence within the EU in order to create equal conditions for online transactions and electronic communications in all member states.

The proposed Directive followed logically from the Commission's action plan to dismantle obstacles to the free movement of goods and services. The objectives was to achieve coordination among the national laws of member states and adequate legal concepts in regards to the extent necessary for the proper functioning of the internal market, in order to ensure the free movement of the Information Society Services between the different Member States.

The E-commerce Directive covers Information Society Services generally defined "as services normally provided for remuneration at a distance, by means of electronic equipment for the processing and storage of data and at the individual request of a recipient of the service". Information Society Services include online financial services and online direct marketing and advertising therefore many cross-border financial services are likely to fall within the scope of the Directive.

Among the aims of the E-commerce Directive is to ensure that Information Society Services benefit from the free movement of services and freedom of establishment within the EU. This specific free movement of services is part of a general principle of Community law. This is provided for in the country of origin principle whereby Information Society Services can be provided throughout the EU if there is compliance with the law in the service provider's home member state.

An Information Society Service, put simply, is a service provided for money, by electronic means over a distance and at the request of the person receiving those services. Examples include selling



or advertising goods or services online, online information services and the provision of commercial communications by e-mail.

Implementing the E-commerce Directive into the different system in each country would not be benefit of anybody, making some how a lack of harmonisation. In such situation both the right holders and other stakeholders as well as information service providers would need to be familiar with a plurality of take down procedures, since digital communications are typically international and do not conform to national boundaries.

Therefore, handling one case might require plurality of different kinds of procedures depending on the location. If the procedure additionally depends on the nature of the illegal content, the issue gets very complicated. It would be the benefit of the service providers to qualify only notices ordered by court or some third party self-regulatory body.

The following Thesis, will be dealing with meaning and understanding of Information Society Services. Trying to define the framework in which they are implemented in the E-commerce Directive. In Chapter One, I will make an analysis of the definition in the regulation, subsequently acknowledge a legal approach of what Information Society Services are, setting up the reasons that the drafters had to include ones and leaves others outside the scope. Due to the complexity of the concept (Information Society Services) the directive is facing many problems with the appearance of new digital technologies. Trying to make an effort to understand the use of a collorary of two directives Transparency Directive<sup>1</sup> and Conditional Access Directive<sup>2</sup> into the E-commerce Directive.

In Chapter two, for these implications explained above I will refer to the terminology used by the drafter when they used the term service itself and the idea of free movement of service. Then I will carry on with the dilute borderline between Information Society Services, broadcasting services and telecommunications services. Such convergence will entail difficulties in placing the different types of services under traditional legal frameworks.

---

<sup>1</sup> 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, as amended by Directive 98/48/EC of 20 July 1998

<sup>2</sup> Council Directive 98/84/EC of 20 November 1998 on the Legal Protection of Services Based on, or Consisting of, Conditional Access



Making the following questions emerge; is IP telephony regulated by the Telecommunication Directives or the E-commerce Directive; in the case of broadcasting is regulated by Broadcasting Directives or E-commerce directive, and what happen in the case of "stream casting"?). These types of questions are definitely the current concerns that are affecting the different legal point of views. Finally making a comparison between traditional and offline services, using the health system to illustrate the impact of the Information Society Services with the advance of new technology.

In my thesis is not the idea to resolve all the problems or give solutions, but is an attempt to gather most of the information in the area of "Information Society Services" which is spread and not analyse in detail by the literature or took into consideration by the drafter of the E-commerce Directive.



## CHAPTER 1 THE ECOMMERCE DIRECTIVE

### 1.1 THE ECOMMERCE DIRECTIVE AND THE INFORMATION SOCIETY SERVICES

Due to the global nature of electronic commerce over the net and the chance to increase business it was certainly a need to develop and avoid at an international level any obstacles to international development of the Internet and electronic commerce. However, the solutions chosen in the Directive cannot be directly copied in the international level, as they require certain level of harmonisation, which might be difficult to achieve on the international level. Today we can affirm fully that the electronic commerce is changing our daily life. The possibilities that offer to the users are enormous, incalculable and unimaginable. The fact of being able to buy without schedules, at lower prices and with greater facilities of comparison between different supplies, is today already a reality<sup>3</sup>.

In the “European Initiative on Electronic Commerce”<sup>4</sup>, the Commission’s proposal in 1997 tried to achieve a set clear objective of creating a European coherent legal framework by the year 2000. The idea for the new E-commerce Directive was to harmonise specific set of rules only where strictly necessary to ensure that businesses and citizens can supply and receive Information Society services throughout the EU. Basically the drafters purposed was to obtain the right balance between the interests of all parties involved, by encouraging business to invest in electronic commerce and consumers to engage in it by ensuring their confidence in this medium.

Manuel Castells, in his trilogy on “The Information age: Economy, Society and Culture”<sup>5</sup>, describes the same process from a slightly broader perspective by stating that the world is undergoing a historic period of transformation to a new global social order. In this new order, networking is the major pattern of social organisation. The economy of this new societal system is increasingly characterised by informationalism (productivity and success depends on the ability to handle information) and globalism (organized on a global scale through networks). The principal driving

---

<sup>3</sup> BOLAS ALFONSO, J. “Firma electrónica, comercio electrónico y fe pública notarial” Revista Jurídica del Notariado, 2000. “las nuevas técnicas telemáticas permiten el envío de mensajes electrónicos que pueden tener diversos significados... ha potenciado el llamado comercio electrónico, aumentando enormemente las posibilidades de las transacciones comerciales entre empresarios y la potencial demanda de bienes y servicios por parte de los consumidores”.

<sup>4</sup>COM (97) 157 final, 16.4.1997

<sup>5</sup> Castells, Manuel “The Information age: Economy, Society and Culture, Vol.1. The Network Society, Oxford: Blackwell, 1996.



force of this process has been the development and rapid spread of information and communication technologies, which provide the necessary platform for an emerging “information” economy. It is therefore evident that there are global forces at work that are resulting in an emerging global “information society”.<sup>6</sup>

One of the principle laid down by the proposal of the Directive was the Internal Market principle in electronic commerce, “which defines the Information Society service provider is established and what information he should provide, provides transparency requirements for commercial communications, ensures that contracts may be concluded by electronic means, deals with the liability of Internet intermediaries and encourages on-line dispute settlement.”<sup>7</sup>

E-commerce remains a high growth area of the economy despite the saturation of the domain name such as dot.com, dot.org or dot.net bubbles. The collapse of overheated investment in IT and e-commerce stocks almost at a stroke removed the majority of the highly speculative and often poorly planned business ventures. Institutions seeking to develop the use of e-commerce services are now much more cognizant of the need for a clear, logical and coherent business plan to ensure success. An important element of that business plan has to be a broad understanding, on the part of both senior management and those tasked with implementing the necessary technical and institutional elements, of the legal environment in which the institution's e-commerce services will be operating<sup>8</sup>.

The increasing role of e-commerce has resulted in significant activity on the part of different governments around the globe and international organisations, such as International Chamber of Commerce, to ensure that it continues to develop within a comprehensive and contemporary framework of legal regulation. This has often meant legislators engaging in a radical rethink of existing regulatory mechanisms in order to accommodate the unique features of new e-commerce related technologies<sup>9</sup>. Commerce by electronic means has seen steady growth since the early days of electronic communications, but in recent years, the development of the Internet and World Wide

---

<sup>6</sup> Information Society Directorate-General Website, [http://europa.eu.int/comm/dgs/information\\_society/index\\_en.htm](http://europa.eu.int/comm/dgs/information_society/index_en.htm), 2002-05-10

<sup>7</sup>COM (1998) 586 final; 98/0325 (COD) Brussels, 18.11.1998 Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on certain legal aspects of electronic commerce in the internal market pp 3

<sup>8</sup> Milano, Giuffrè “Teoría Jurídica del Documento”, pp11. SERRA DOMINGUEZ “Prueba documental”, Enciclopedia Jurídica Seix.

<sup>9</sup> [http://www.epp-ed.org/Policies/pkeynotes/33digital-economy\\_en.asp](http://www.epp-ed.org/Policies/pkeynotes/33digital-economy_en.asp)



Web, combined with the increasing sophistication and falling price of both business and consumer<sup>10</sup> technologies, has seen a dramatic expansion in the role of e-commerce<sup>11</sup> in both B2B<sup>12</sup> and B2C<sup>13</sup> relationships, in addition to its driving influence in the newer area of C2C<sup>14</sup> transactions.

The e-commerce related technologies and legislation, focuses, in particular, on the effect that these might have upon institutions, organization public and private and among the private users in the EU<sup>15</sup>. Whether an institution is providing e-commerce services for consumers (e.g. advanced distance learning courses), contracting to use e-commerce services from other businesses (e.g. online purchasing), or simply adopting e-commerce related technologies in the workplace and among student populations (e.g. smart cards<sup>16</sup>, electronic purses<sup>17</sup>) those involved in their adoption and provision will need to be aware of the developing legal framework. Additionally, the adoption of e-commerce technologies will also require managers and administrators responsible for their implementation and oversight to ensure that their institution is aware of the implications of broader legislative initiatives, such as data privacy and freedom of information for any proposed uses of e-commerce technologies using Information Society Services.

At the time of the Ecommerce Directive's draft the Commission was aware how fundamental was in a well functioning for the international market. It is also recognized that these new online services will become a source of economic growth and employment. However, an appropriate regulatory framework has to be put in place in order to provide an international, or at least a pan-European level playing field.

New Information Society Services are being created with enormous steps as, and the need to analyze potential technical and legal barriers to the development of Information Society Services.

---

<sup>10</sup> For the purposes of the Distance Selling Directive and the E-Commerce Directive, a consumer is any natural person who is acting for purposes other than those of his trade, business or profession.

<sup>11</sup> Electronic commerce or e-commerce; the conduct of a financial transaction by electronic means, increasingly used to mean the buying and selling of goods and services on the Internet, especially the World Wide Web.

<sup>12</sup> B2B; business-to-business.

<sup>13</sup> B2C; business-to-consumer.

<sup>14</sup> C2C; consumer-to-consumer.

<sup>15</sup> Charles worth Andrew Developments in E-commerce Law - JISC Legal - Briefing Paper

<sup>16</sup> Smart card: An integrated circuit card that has a microprocessor and memory functions, which can add, delete, and otherwise manipulate information on the card (e.g. electronic cash payment cards). In theory, data residing in the chip can be protected against external inspection or alteration, so effectively that the vital secret keys of the cryptographic systems used to protect the integrity and privacy of card-related communications can be held safely against all but the most sophisticated forms of attack.

<sup>17</sup> Electronic purse: an application in an integrated circuit card able to store and manipulate an electronic value





Together with the impact of information and communications technologies on the competitiveness of selected industry sectors for having the “best practice” possible.

As an examples are on-demand services and digital broadcasting such as the mobile telephony denominated M-Commerce, which is causing a greater revolution in our days allowing access to Internet trough WAP system and “new business models will be facilitated by the amendments clarifying the scope of rights - to the advantage of all the key players (right holders, users and intermediaries alike)”;<sup>18</sup> ONP Voice Telephony or the implementation of the E-Money Directive as money placed in prepay accounts and used to buy non-phone services, such as subscribing to a website or entering prize competitions would be held to be e-money.

## **1.2 BACKGROUND HISTORY INFORMATION SOCIETY**

The EU regards the effective legal regulation of the e-commerce sector as a vital element in stimulating future economic growth, promoting closer integration, and allowing the EU to play a direct role in the setting of international technical, commercial, and legal standards. As such, the EU has issued a series of key Directives over the past 8-10 years, which either directly, or indirectly, have had the effect of placing e-commerce services within a tighter regulatory framework. Awareness of existing legal regulation of e-commerce and a grasp of how the law may affect the possible uses of e-commerce services are critical. Failure to adequately address the relevant legal issues may well result in costly and institutionally damaging setbacks to the implementation of e-commerce services.

The Commission's work, started by meeting with the different organism such as the European parliament<sup>19</sup>, which expressed their opinion in a resolution of 15 April 1998 and doing consultations with interested parties. The goal was to identify a various number of legal problems that were needed to ensure the smooth flow of Information Society Services and balance in electronic commerce. By creating a suitable regulatory framework that safeguard the rights of users of electronic commerce<sup>20</sup>. The Commission has also taken account of the opinions of the Committee of

---

<sup>18</sup> <http://www.patent.gov.uk/about/consultations/eccopyright/annexc.htm>

<sup>19</sup> Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on “A European initiative in electronic commerce” A4-0173/98. pp 8

<sup>20</sup> Resolution of 14 April 1998, point 14.



the Regions and of the Economic and Social Committee<sup>21</sup>, of the consultations held with interested parties on the basis of the Communication and of other initiatives on the Information Society.

“The Single Market's legal framework, combined with the single currency, provide the European Union with a unique opportunity to facilitate the development of electronic commerce”, commented Single Market Commissioner Mario Monti. “Electronic commerce adds a new dimension to the Single Market for consumers in terms of easier access to goods and services of better quality and at lower prices. Electronic commerce will promote trade, stimulate innovation and competitiveness and create sustainable jobs. This proposal should ensure that the Union reaps the full benefits of electronic commerce by boosting consumer confidence and giving operators legal certainty, without excessive red tape.”<sup>22</sup>

First the necessity to clarify the existing legal framework<sup>23</sup>, a clear out the differences “in certain legal provisions applicable to Information Society services in different Member States as an exception to the principle of free movement and subject to conformity with the case law of the Court of Justice, one Member State may make the provision of a service from another Member State conditional on supervisory measures or the application of its own legislation. This legal uncertainty arises over the lawfulness of measures taken by one Member State concerning services provided by providers established in another Member State (are they justified in relation to the principle of freedom to provide services or of secondary Community law applying that principle?) Legal uncertainty also arises in determining the requirements to be met by Information Society services (to what extent does a particular rule apply to such services?) Cases which have already been decided diverge, indicating that there is a serious lack of legal certainty whose adverse effects are strongly amplified in a cross-border situation.”<sup>24</sup>

---

<sup>21</sup> Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: “A European initiative in electronic commerce”, OJ C 19, 21.1.1998, p. 72.

<sup>22</sup> [http://europa.eu.int/comm/internal\\_market/en/ecommerce/999.htm](http://europa.eu.int/comm/internal_market/en/ecommerce/999.htm)

<sup>23</sup> Cf., supra 5. The proposed Directive would ensure that information society services benefit from the Single Market principles of free movement of services and freedom of establishment and could provide their services throughout the European Union (EU) if they comply with the law in their country of origin. Such services are defined as those provided normally against remuneration, at a distance, by electronic means and in response to the individual request of a customer.

<sup>24</sup> COM(1998) 586 final Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on certain legal aspects of electronic commerce in the internal market pp 7- 8



The legislator concern was again reflected in the Transparency Directive “Whereas notification should be provided for notably in the case of rules which are likely to evolve in future; whereas services which are provided at a distance, electronically, and at the individual request of a recipient of services (Information Society services) are likely, in view of their diversity and their future growth, to necessitate and generate the largest number of new rules and regulations; whereas provision must accordingly be made for the notification of draft rules and regulations relating to such services”.<sup>25</sup> Continuing with a ramification in recital 22, which tend to complicate the understanding<sup>26</sup>.

The E-commerce Directive would clarify that the Single Market principle of mutual recognition of national laws and the principle of control in the country of origin must be applied to Information Society Services so that such services provided from another Member State are not restricted for reasons falling within the scope of the proposal which would not cover taxation, personal data (the free movement of which is covered by Directive 95/46,<sup>27</sup> the activities of notaries, representation and defence of clients before a court, gambling activities. Furthermore, the E-commerce Directive would not interfere with the application of the Brussels Convention on jurisdiction, recognition and enforcement of judgments in civil and commercial matters and the Rome Convention on the law applicable to contractual obligations.<sup>28</sup>

Another goal of the proposal was to achieve a high level of consumer protection in order to encourage the growth of ecommerce and confidence of the consumer by using Internet as a medium for different transaction, communications and entertainment. Promoting the ideas of the proposal

---

<sup>25</sup> Recital 15 DIRECTIVE 98/48/EC Official Journal L 217, 05/08/1998 P. 0018 - 0026

<sup>26</sup> Whereas, moreover, provision should be made for exceptional cases in which national rules and regulations concerning Information Society services might be adopted immediately and whereas it is also important to allow this possibility solely for urgent reasons linked to serious and unforeseeable circumstances, such as circumstances of which there was no previous knowledge and the origin of which is not attributable to any action on the part of the authorities of the Member State concerned, so as not to jeopardize the objective of prior consultation and administrative cooperation inherent in this Directive;

<sup>27</sup> [http://europa.eu.int/comm/justice\\_home/fsj/privacy/](http://europa.eu.int/comm/justice_home/fsj/privacy/)

<sup>28</sup> [http://europa.eu.int/comm/internal\\_market/en/ecommerce/999.htm](http://europa.eu.int/comm/internal_market/en/ecommerce/999.htm) The E-commerce Directive would define the place of establishment as the place where an operator actually pursues an economic activity through a fixed establishment, irrespective of where websites or servers are situated or where the operator may have a mail box. This definition is in line with the principles established by the EC Treaty (Article 52) and the case law of the European Court of Justice. Such a definition would remove current legal uncertainty and ensure that operators could not evade supervision, as they would be subject to supervision in the Member State where they were established. The proposal would prohibit Member States from imposing special authorization schemes for information society services, which are not applied, to the same services provided by other means. It would also require Member States to oblige information society service providers to make available to customers and competent authorities in an easily accessible and permanent form basic information concerning their activities (name, address, e-mail address, trade register number, professional authorisation and membership of professional bodies where applicable, VAT number).



without restricting the general interest and objectives such as consumer protection, basically to avoid illegal activities. Governments should create effective control by national authorities at the origin of the activity (in the Member States where the company in questions is established); it has the effect of making national authorities more responsible for their obligation to ensure the protection of the general interest not only within their borders but also throughout the Community and in the interests of citizens of other Member States.

Transparency is a key tool not only for information services provider but for all kind of handling of electronic communications and transaction, there was a clear need to create codes of conduct and establish systems of redress that can give relief for those affected by the different activities over the World Wide Web. “It should be noted that the European Community Treaty criteria determining the law applicable to contractual obligations, which allow for derogations in favour of the consumer would be met, for example, in the case where the conclusion of the contract was preceded by a specific invitation by e-mail sent to the consumer’s country and where the consumer undertook the steps necessary to conclude the contract in his country. Finally, given the speed and geographic scope of damages caused by illegal Internet activities, it is desirable that Member States allow for the act initiating a national Court action to be sent by appropriate electronic means and in a language other than that of the Member State of jurisdiction.”<sup>29</sup>

### **1.3 SCOPE OF THE DIRECTIVE**

The European Directive on Electronic Commerce was adopted by the European Parliament and the Council on 8 June 2000. Its full name is 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.<sup>30</sup>

The main objective of the Directive is to enhance the proper functioning of the European Community internal market by removing all legal barriers allowing the free movement of Information

---

<sup>29</sup> Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on “A European initiative in electronic commerce” A4-0173/98. pp 9-10

<sup>30</sup> OJ L178, 17.07.2000, p.1.



Society Services between the Member States<sup>31</sup>. To create an integrated single European market five basic principles were inscribed in the European Community Treaty.

Besides the right of establishment,<sup>32</sup> the free movement of persons<sup>33</sup> and capital,<sup>34</sup> the free movement of goods,<sup>35</sup> and the free movement of services were inscribed in Article 49 of the EC Treaty. Article 49 of the EC Treaty states that: “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.”<sup>36</sup>

I will refer in more extension later on to the specific free movement of services are part of a general principle of Community law, namely freedom of expression as enshrined in article 10(1) of the European Convention on Human Rights and Fundamental Freedoms, and it is subject only to restrictions expressed in paragraph 2 of that article 3 and in article 46(1) of the EC Treaty.<sup>37</sup> In turn, Member States may not restrict the freedom to provide services, i.e. may not take measures, which hamper or otherwise make less attractive the provision of Information Society Services from other Member States to their territory, unless such measures are covered by one of the derogations provided in the text of the Directive. This single market must ensure that European businesses and citizens are able to receive and supply Information Society services throughout the Community, irrespective of frontiers. Indeed, the legal framework of the internal market forms a major asset for electronic commerce, and electronic commerce forms a major asset for the internal market.

The Directive on electronic commerce seeks to remove the legal obstacles, which remain to the on-line provision of services. The directive aims at further clarifying the legal responsibilities of service providers and thus, at further improving a high standard of consumer confidence through the national legislation and International legislation in place, which allows more consumer confidence,

---

<sup>31</sup> Directive on Electronic Commerce 2000/31/EC Official Journal L 178 , 17/07/2000 P. 0001 – 0016 Article 1(1) by this statement the objective was to give certain legal surety for the surrounding of such services.

<sup>32</sup> Article 43 EC Treaty (ex article 52)

<sup>33</sup> Article 39 EC Treaty (ex article 48)

<sup>34</sup> Article 56 EC Treaty (ex article 73b)

<sup>35</sup> Article 30 EC Treaty (ex Article 36)

<sup>36</sup> Article 49 EC Treaty (ex article 59).

<sup>37</sup> Article 46 (1) under Title III Free movement of persons, services and capital, Chapter 2 Right of establishment, provides that: “The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.



and trust in the digital environment. The directive aims are interalia to develop that Information Society Services should generally comply with the legislation in the country where the service provider is established which allow the free movement of the Information Society Services. The directive seeks to remove the uncertainty about how existing legislation can be applied to the on-line provision of services, reinforce consumer confidence.

The changes in the wording in article 1(1) denote the complication of regulation subjects related to the World Wide Web. In the initial proposal the terminology used was “(...) This Directive seeks to ensure...” According to Arno R Loader; “It is impossible to ensure the proper functioning of the internal market in such an open, global environment as the Internet. In the recitals the inherent global nature of Information Society Services is recognised.”<sup>38</sup>

There are a number of exceptions to the scope of the Directive and the employer/employee relationship is excluded, as are activities, which cannot, by their very nature, be carried out at a distance and by electronic means. An example is where medical advice is given which requires the physical examination of a patient. No does the Directive to other matters including tax, representing clients in court and certain gambling activities. There are other exceptions and the Directive is without prejudice to protection already available, in particular, in terms of public health and consumer interest, as established in a number of other Directives (examples being unfair terms in consumer contracts, distance contracts, misleading advertising and the advertising and sponsorship or tobacco products).<sup>39</sup>

#### **1.4 ANALYSIS OF THE CONCEPT INFORMATION SOCIETY SERVICE UNDER THE TRANSPARENCY DIRECTIVE, CONDITIONAL ACCESS AND E-COMMERCE DIRECTIVE**

The definition of “Information Society Services” is somewhat complex. Suffice to say here that it generally covers all services provided over the information networks. The E-commerce Directive

---

<sup>38</sup> E-Directives: Guide to European Union Law on E-Commerce Commentary on the Directives on Distance Selling, Electronic Signatures, Electronic Commerce, Copyright in the Information Society, and Data Protection Edited by Arno R. Lodder Henrik W. K. Kaspersen ED. 2002 KLUWER LAW INTERNATIONAL THE HAGUE / LONDON / NEW YORK. Chap 4 pp 69

<sup>39</sup> [http://cw.prenhall.com/bookbind/pubbooks/bainbridge\\_ema/chapter1/custom7/deluxe-content.html](http://cw.prenhall.com/bookbind/pubbooks/bainbridge_ema/chapter1/custom7/deluxe-content.html)



applies to Information Society services (ISS), as already defined in the “Transparency Directive”<sup>40</sup> and in the “Conditional Access Directive”,<sup>41</sup> as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service<sup>42</sup>. By way of derogation certain services or areas are entirely excluded from the scope of application of the directive (Article 1 paragraph 5), e.g. the field of taxation, questions covered by data protection directives<sup>43</sup> or certain gambling activities.

The European Commission claimed on the initial proposal that the definition covered all sorts of Information Society services<sup>44</sup>, both business to business and business to consumer, consumer to consumer, for example: online contracting and selling goods online, electronic newspapers, virtual shopping malls (the fact that the good is not delivered online does not imply that interactive tele-shopping is not an Information Society service<sup>45</sup>), online databases, online financial services, online professional services (such as consultants lawyers, doctors, accountants, estate agents<sup>46</sup>), organization and management of auctions by electronic means, virtual supermarkets, online entertainment services such as video on demand, online direct marketing and advertising, and sales and distribution services, online sale of goods, purchase management in the web carried out by groups of people, sales services for certain products such as motor vehicles, tourism services, educational services, entertainment services online encyclopaedias, BBS, job-search services, search engines, services providing access to the World Wide Web (discussion group, chat room etc).<sup>47</sup>

---

<sup>40</sup>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, as amended by Directive 98/48/EC of 20 July 1998); (OJ L 204, 21.07.1998, p. 37 and OJ L 217, 5.8.1998, p.18)

<sup>41</sup> Directive 98/84/EC (OJ L 320, 28.11.1998, p. 54)

<sup>42</sup> Recital 17 Directive 2000/31/EC (...) Including digital compression and by means of electronic equipment for processing also storage of data.

<sup>43</sup> Directives 95/46/EC and 97/66 /EC (OJ L 281, 23.11.1995, p.31 and OJ L 24, 30.01.1998)

<sup>44</sup> Information Society Services are online professional services such as online banking, distance learning, stockbrokers, travel agents and health care services, interactive entertainment (video-on-demand and video games), online information services, electronic databases, electronic retailing, electronic newspapers. A list of services which are not considered conditional access services can be found in the Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations and providing for regulatory transparency in the internal market for information-society services, Comments on the Articles, Art. 1, Bulletin EU 7/8-1996. Available at URL <http://www.europa.eu.int/abc/doc/off/bull/en/9607/p103159.htm>.

<sup>45</sup> COM(1998) 586 final Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on certain legal aspects of electronic commerce in the internal market pp15

<sup>46</sup> IP/03/1580 Brussels, 21st November 2003 e-commerce: EU law boosting emerging sector pp2

<sup>47</sup> It is essential to cover all of these activities since all these services should be able to benefit from the internal market and, in legal terms, be guaranteed that they can develop without regard for frontiers; moreover, the development of the internet economy shows that the same service provider can supply a large number of services across frontiers.



Another interesting point that we should notice is for example the proper nature of e-gaming one should consider the following the constant jurisprudence of the EC Court, the provision of gaming activities has to be considered a service.<sup>48</sup> By virtue of Directive 1998/34/EC, as amended by Directive 98/48/EC, e-gambling<sup>49</sup> can be considered services of the information society, as they are: i) normally provided for remuneration at a distance; ii) conducted by electronic means; and iii) executed at the individual request of a recipient of services, for instance, the gambler.

Nevertheless, the Directive sets out a double exclusion. On the one hand, two categories of services are excluded from its scope of application: first, services that do not respond to the three aforementioned constitutive elements, for example, the services enumerated in Annex V of the Directive;<sup>50</sup> and second, the service must meet the definition set forth in Article 50 of the EC Treaty. Services provided by a Member State without any economic consideration in the context of its duties—in particular in the social, cultural, educational and judicial fields—are not covered by the definition given in Article 50 of the EC Treaty and therefore do not fall within the scope of this Directive. As indicated, the European Court of Justice has formally recognized gaming activities as services.<sup>51</sup> On the other hand, in addition to the excluded services, some regulations are excluded

---

48 Läära, Case C-124/97 para 15-18. See notably the Walrave Case, C-36/74, Walrave, 1974 ECR I-1405, and Donà v Mantero, Case C-13/76, Donà v Mantero, 1976 ECR I-1333, decisions in which the court held that certain sports activities were not of an economic nature and therefore not covered by the EC Treaty. Schindler, Case C-275/92, paragraph 35. In Schindler, Advocate General Gulmann pointed out that the fact that the allocation of profits for public interest purposes did not alter the economic character of an activity. However, this argument is significant when assessing whether the adoption of a restrictive measure is justified. In relation to Council Directive 75/368/EEC of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various services, Official Journal L 167, June 30, 1975, P. 0022–0028. This Directive is no longer in force.

<sup>49</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, establishing a procedure for the provision of information in the field of technical standards and regulations, Official Journal L 204, 21/07/1998 P. 0037-0048 CONSLEG-98L0034-05/08/1998-33 P, amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, Official Journal L 217, 05/08/1998 P. 0018-0026 CONSLEG-98L0034-05/08/1998-33 P.

<sup>50</sup> E.g., all point to multi-point broadcasting services such as radio and television services, phone and fax services, etc.

<sup>51</sup> Case C-326/88, GB-INNO, 1990 ECR I-667. This case concerned advertisements for goods within the meaning of Article 30 of the EC Treaty. See also the court's Familia press decision regarding competitions published in magazines in the form of cross words and puzzles giving readers the possibility to win something. Case C-368/95, Verenigte Familiapress Zeitungsverlags undvertriebs GmbH v Heinrich Bauer Verlag, 1997 ECR I-3689. See Cf, supra note 43 Läära, at paragraph 18. and the jurisprudence of the European Court of Justice, Case C- 36/74, Walrave-Koch; Case C-13/76, Donà v. Mantero; Case C-15/78, Koestler, o.c.; Case C-352/85, Bond van Adverteerders. Together with Article 50 of the EC Treaty (ex Article 60) these activities must be considered as services, because they are services that are normally provided for remuneration, insofar as they are not governed by the provisions relating to the freedom of movement of goods, capital, and persons.





from its scope of application, notably the regulation of telecommunication services, provided that European law covers these services, in particular by Directive 90/387/ EC.<sup>52</sup>

Once a service is qualified as an Information Society Services, each non-excluded regulatory proposal must be communicated to the Commission.<sup>53</sup> This notification procedure was put in place to safeguard the free provision of goods<sup>54</sup> and Information Society Services.<sup>55</sup> In this way, if a Member State adopts a restrictive measure, the Commission and the Member States can formulate remarks, softening the restriction. It is conceivable that Member States, where online gaming organized by private companies is authorized, will criticize proposals imposing a restriction to the freedom to provide services or vice versa.<sup>56</sup> If a Member State does not notify the Commission, or fails to do so in due time, the regulatory provision will be unenforceable pursuant to the jurisprudence of the European Court of Justice. Indeed, the EC Court held that the breach of the obligation to notify constitutes a substantial procedural defect such as to render the regulation in question inapplicable, and thus unenforceable against individuals.<sup>57</sup>

#### **1.4.1 ANALYSIS OF THE CONCEPT UNDER THE TRANSPARENCY DIRECTIVE**

---

<sup>52</sup> Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, Official Journal L 192, 24/07/1990 P. 0001-0009. It should be underlined that in the field of telecommunications the European Institutions are pursuing drastic regulatory modifications. By mid 2003 the new regulatory framework for electronic communications networks and services will be in place. This framework will consist of five harmonization directives of the European Parliament and Council, one liberalization Directive of the Commission and a decision of the European Parliament and Council concerning a Community radio spectrum policy.

<sup>53</sup> Article 8 of Directive 98/34/EC states that Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft. Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation. Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

<sup>54</sup> See Directive 1998/34/EC.

<sup>55</sup> See Directive 1998/48/EC.

<sup>56</sup> See, e.g., the criticism of Denmark regarding the more liberal UK legislation, The National Internet Gaming Strategy of the Danish Ministry of Taxation of 18 June 2001.

<sup>57</sup> See ECJ, Case C-194/94, CIA Security International S.A.v. Signalson S.A., Jur. H.v..J, 1996 ECR I-2201; For the application of this principle in a criminal procedure, see ECJ, Case C-226/97, Johannes Martinus Lemmens, 1998 ECR I-3711.



We found the definition in the Transparency Directive<sup>58</sup> expressed at article 1(a) 2, The rationale of the drafters was to take into account the different social, societal and cultural implications inherent in the advent of the Information Society; specially, in the use of the procedural rules laid down in that Directive for Information Society services should not affect cultural policy measures, particularly in the audiovisual field.

It was necessary for Member States to adopt and adapt in accordance with Community law, a the existing national rules the different regulations applicable to services available at that time and at present so as to take account of new Information Society services, in such a manner that will ensure the general interest is in the best way possible. On the other hand, with a view to simplifying such rules and regulations where their application is disproportionate to the objectives they pursue.

Therefore, they amended the Directive 98/34/EC with a view to applying it into the draft rules and regulations on Information Society services are the best suited approach, with regard to the legal framework of the said services, to meeting effectively the need for transparency in the internal market.<sup>59</sup>

In the Transparency Directive<sup>60</sup> in article 1(a) 2 as follows: “service”, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition:

**(1) “...Any information society service<sup>61</sup>”** the wording of the article and the use of the term “**any**” give very wide ranges of services that can be apply to the information society field. Online

---

<sup>58</sup> OJ 204, 21.7.1998, p. 37, as amended by European Parliament and Council Directive 98/98/EC of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 217, 5.8.1998, p. 18.

<sup>59</sup> Recital 15 DIRECTIVE 98/48/EC Official Journal L 217, 05/08/1998 P. 0018 - 0026

<sup>60</sup> Directive 98/34/EC as amended by Directive 98/48/EC (OJ L 204, 21.07.1998, p. 37 and OJ L 217, 5.8.1998, p.18)

<sup>61</sup> UNITED NATIONS Distr. GENERAL TD/B/COM.3/EM.8/2 4 May 1999 TRADE AND DEVELOPMENT BOARD Commission on Enterprise, Business Facilitation and Development Expert Meeting on Capacity Building in the Area of Electronic Commerce: Legal and Regulatory Dimensions Geneva, 14 July 1999 Item 3 of the provisional agenda LEGAL DIMENSIONS OF ELECTRONIC COMMERCE Report by the UNCTAD Secretariat pp 12 “In 1997, the Commission set out its approach to electronic commerce in “A European initiative in electronic commerce”, announcing the creation of a legal framework for the internal market based on the principle of country of origin control. The initiative stressed the importance of a favorable regulatory framework as the basis for the development of electronic commerce, and set forth several proposals for creation of such a favorable climate. In November 1998, the Commission issued a proposal for a “European and Council Directive on certain legal aspects of electronic commerce in the internal market”. Following on the suggestion in the Initiative that barriers to electronic commerce be identified to allow for the creation of such a framework, the proposal noted that differences in legal rules applicable to information society services (or third party



information, commercial communications, interactive advertising or providing search facilities for access to and retrieval of data including where payment is by a person other than the person in receipt of the service.

The terminology of “**Information Society Services**” is somewhat complex by itself. Suffice to say here that it generally covers all services provided over the information networks. According to the Directive 98/48/EC recital 2 “a wide variety of services within the meaning of Articles 50 of the Treaty will benefit by the opportunities afforded by the Information Society of being provided at a distance, electronically and at the individual request of a recipient of service”.<sup>62</sup>

The word ‘**service**’ on its own is considered to be confusing as for many traders it has a different meaning than “Information Society Services”. It would be extremely helpful if further clarification were provided in the guidance in order to determine what is meant by it. According to Arno R. Lodder, “Information Society Services” is somewhat misleading. I agree with this idea because can involve any kind of services as long as fall under the criteria, like selling products, which is generally thought of as distinguishable from rendering services, is clearly covered. In that case, the "service" may be only the offering of the possibility to contract over the Internet. In principle, both closed, access-controlled ecommerce and open access systems are covered.<sup>63</sup> For example would the authorization required for a retailer to supply offline be covered where the Information Society Services consisted of online advertising and sale which itself does not require authorization. The relevant authorization applying to the goods sold themselves and their delivery, which are not being done online, is not an Information Society Service.

To fully understand the explanation in the above paragraph businesses must understand the split of a proposed service into the sale of the service or the goods of various Information Society Services e.g. advertising goods online, sale transaction online, delivery either online or offline. This is not clear from the E-commerce Directive currently and if businesses are to understand how to comply it

---

information service providers) effectively created barriers to electronic commerce. In essence, the proposal would establish a coherent legal framework for information society services involved in electronic commerce in the European Union. Under this framework, any information society service established within the EU that complied with the laws of its country of origin would be assured of the ability to offer its services throughout the European Union without having to comply with the laws of all member States. In essence, single market concepts of free movement of services and freedom of establishment would be applicable.

<sup>62</sup> [http://portal.etsi.org/public-interest/Documents/Directives/Standardization/Directive\\_98\\_34amended.doc](http://portal.etsi.org/public-interest/Documents/Directives/Standardization/Directive_98_34amended.doc).

<sup>63</sup> Recital 18, E-commerce Directive. Television and radio broadcasting are not covered because they are not provided at individual request. Video-on-demand, however, is covered.



is essential this be clarified. If we concentrate in the Internal Market perspective, as the Directive stands at the moment it poses a problem because it leads to a situation where any Information Society Services, any website, as far as contractual obligations are concerned, could be subject to be sued in any Member State, which will lead to different jurisdictional problems, which works against consumer protection.

One of the critics that were made by the ICTR was that “the definition of “Information Society Services” does not adequately cover the activities described in Articles 12, 13, and 14 of the proposed Directive, i.e., hosting, caching, and storage. These purely technical activities are critical to the proper functioning of the Internet, yet they generally are not provided “at the individual request of a recipient of services” as required by Article 2(a). To eliminate any possible confusion about the application of Articles 12, 13, and 14, we urge that the following new paragraph be included at the end of Article 2(a): For purposes of this Directive, the activities described in Articles 12, 13, and 14 shall be deemed to be Information Society Services”<sup>64</sup>.

(2) “**...Provided for remuneration**”. The Commission indicates that this definition is intended to cover a “large number of very different economic activities which may be carried out on line”, as long as they require certain kind of payment or the activity involves requiring only an “economic character”. The requirement of remuneration for Information Society Services are not restricted to services that give rise to online contracting, but extend to services free of charge to the recipient. It also covers services (insofar as they represent an economic activity) that are not directly remunerated by those who receive them, such as those offering online information or commercial communications (e.g. sponsoring or advertisement) or providing tools allowing for search, access and retrieval of data.

By analysing the sentence, it is necessarily to start excluding free information websites and those, “which may or may not include harmful material (e.g. incitement to racial hatred) or illegal material (e.g. instructions on money laundering, drug trafficking, pornography) where no remuneration passes. The requirement for an Information Society Services to be “normally provided for remuneration” does not restrict its scope to services giving rise to buying and selling online. It also covers services (insofar as they represent an economic activity) that are not directly remunerated by

---

<sup>64</sup> [http://www.icrt.org/pos\\_papers/1999/990311\\_EC\\_Gen.pdf](http://www.icrt.org/pos_papers/1999/990311_EC_Gen.pdf) 11 March 1999 International Communications Round Table Initial Comments on the Proposed Electronic Commerce Directive



those who receive them, such as those offering online information or commercial communications (e.g. adverts) or providing tools allowing for search, access and retrieval of data.<sup>65</sup>

Nevertheless, the narrow interpretation of “**provided for remuneration**” could result in the exclusion of important services from the scope of the Directive. Companies providing Information Society Services continue to experiment with different economic models. While a small number of services operate on a “fee for service” basis, many more are sustained by revenue from advertising, so called also interactive advertising.

Many companies have established “closed user groups” such as Extranets for use by their business partners. These closed user groups by definition are not open to the public. They are designed to permit secure, inexpensive communication between the company and specific groups of individuals. For example, a company may provide its suppliers with information about shipping, pricing, delivery, and product specifications, and may enter contracts with such suppliers electronically. Closed user group activities clearly have an “economic character”, and thus are “provided for remuneration”. The Directive and its Internal Market provisions should cover them.<sup>66</sup>

(3) “**...At a distance**” means remote electronic services where the service is provided without the parties being present at the same time with no face-to-face contact. In other words, the meaning of a distance communication is any method which without simultaneous physical presence of supplier and consumer. May be used for making a contract between those parties or other purposes. Here two sets of rules have been developed depending on the nature of the communications technology employed

Therefore point-to-point transmissions including video on demand, commercial communications by electronic mail,<sup>67</sup> (but this does not extend to individual communications by natural persons not by way of their trade, business or profession including their use for the conclusion of contracts).<sup>68</sup>

---

<sup>65</sup> A GUIDE FOR BUSINESS TO THE ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002 (SI 2002/2013) 31 JULY 2002 Information society services

<sup>66</sup> Cf., supra 61

<sup>67</sup> Recital 3 E-commerce Directive

<sup>68</sup> <http://secretariat.efta.int/EFTASec/Web/EFTACConvention/EFTACConventionTexts/AnnexHTBT.pdf> ANNEX H Procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Art. 14) ARTICLE 1 Num.2



The definition excludes all services which are not offered “at a distance” nor via electronic means nor supplied on individual demand, such as services provided in the physical presence of the provider and the recipient, services that do not use electronic processing/inventory systems or services which are transmitted on a point to multipoint basis.<sup>69</sup> Examples include: medical examinations or treatment at a doctor’s surgery using electronic equipment where the patient is physically present. Consultation of an electronic catalogue in a shop with a customer on site; plane-ticket reservation at a travel agency in the physical presence of the customer by means of a computer network; and electronic games made available in a video arcade where the customer is physically present.

However, the use of email or equivalent electronic communications (e.g. by persons acting outside their trade, business or profession, including their use for the conclusion of contracts between such persons) is not an Information Society Services. These can include communications between recipients of a service and a service provider via interactive digital television, including where a recipient providing his unique membership number and PIN initiates the service. Also excluded from the definition of “Information Society Services” are the contractual relationship between an employee and his employer and the statutory auditing of company accounts.

Information Society Services also include services consisting of the transmission of information via a communication network, providing access to a communication network, or hosting information provided by a recipient of the service. If natural persons use e-mail or an equivalent individual communication medium for personal or other non-business purposes, however, they are not subject to the directive's requirements, even where they enter into electronic contracts<sup>70</sup>.

“The service should be provided without the parties being simultaneously present”. For example, a rental car could be ordered using a mobile, while one is standing at the desk of the garage where the car is parked. In my opinion the use of electronic means is the decisive criterion. However, this does not mean that “**at a distance**” should be deleted from the definition, because in almost all cases the criterion “**at a distance**” is helpful. Moreover, deleting this criterion would for example mean that the Directive applies to Internet cafes where access to Internet is provided not

---

<sup>69</sup> <http://conventions.coe.int/Treaty/EN/Reports/Html/178.htm>

<sup>70</sup> Volume 5 Number 47 Page 1210 Wednesday, December 13, 2000 Electronic Contracting in Europe By Prof. Lucas Bergkamp and Serge Clerckx



at a distance. The rationale for the criterion is that parties at a distance cannot communicate face-to-face. So, the actual criterion should be whether face-to-face contact is possible. If parties are not at a distance and face-to-face contact is possible, the service is not of the Information Society; in all other cases, it is. For the example of the car rental this means the following. In case the rental car can be ordered at the desk, the service should not be considered one of the Information Society. In case the rental car cannot be ordered at the desk ([e.g. easyrentacar.com](http://e.g. easyrentacar.com)), despite the simultaneous presence of the representative of the rental company and the customer, the service should be considered one of the Information Society”<sup>71</sup>.

**(4) “...By electronic means”** means shall mean in particular an electronic communication network, electronic equipment and cable networks, optic fiber, radio, satellite and others, used to process, store or retransmit information; telecommunications terminal equipment and electronic mail. 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,<sup>72</sup>

Information Society Services do not include all commercial activities carried on “at a distance” but only those carried on by ‘electronic’ means. Thus, for example, the Directive includes services provided over the Internet, by solicited e-mail, and interactive television, but does not cover services provided by telephone or fax, even though many telephones and faxes are digital. The precise definition relates back to previous EU Directives, which give examples of services included within the definition, and excluded. “This approach does create considerable uncertainties.”<sup>73</sup>

The exclusions and confusions are regrettable, given the fact that the Internet, telephone and fax are often used in conjunction with each other service. The following are excluded from this definition: any information provided electronically without remuneration; information provided in

---

<sup>71</sup> e-Directives: Guide to European Union Law on E-Commerce Commentary on the Directives on Distance Selling, Electronic Signatures, Electronic Commerce, Copyright in the Information Society, and Data Protection Edited by Arno R. Lodder Henrik W. K. Kaspersen ED. 2002 KLUWER LAW INTERNATIONAL THE HAGUE / LONDON / NEW YORK pp71-72

<sup>72</sup><http://secretariat.efta.int/EFTASec/Web/EFTAConvention/EFTAConventionTexts/AnnexHTBT.pdf> ANNEX H Procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Art. 14) ARTICLE 1 Num.2

<sup>73</sup> Graham Smith, in Internet Law and Regulation, Sweet & Maxwell, London, 2002, at p 268. See pp 268-269 for a discussion on the various possibilities for confusion.



hard copy form; any services which are provided at a distance but not undertaken by electronic means.

“Traditional distance selling methods, like mail-order firms, are not Information Society Services. The services of a mail-order firm carried out using a website do fall under the scope of the Directive”<sup>74</sup>. At present, access to such services is mainly through the use of personal computers with dial-up access to the Internet. PCs are also a primary means to create and maintain content. For example based on the definition of Information Society Services and the various examples, electronic software is an Information Society Service. However, delivery of software on a disk would not be considered an Information Society Service.

According to Trevor Cox Based on the definition of Information Society Services and the various examples, electronic software is an Information Society Services. However, delivery of software on a disk would not be considered an Information Society Services. The E.U. is leaving to the Member States to decide the rules applicable to software on a disk. Since the Member States treat software as a good, this exemption is likely to have little impact on uniform treatment of software in the Member States<sup>75</sup>.

The general understanding of services excluded from the definition because they are not provided **“by electronic means”** include: those having material content even though provided via electronic devices, such as: automatic cash or ticket-dispensing machines (e.g. for banknotes or rail tickets); and access to road networks and car parks, charging for use (even if there are electronic devices at the entrance and/or exit controlling access) and ensuring correct payment is made; those provided offline, such as the distribution of CD-ROMs or software on discs; and those not provided via electronic processing or inventory systems, such as fax and telex services; services provided via voice telephony or fax, consultation of a doctor or lawyer by phone or fax; and direct marketing by phone or fax.

**(5)“at the individual request of a recipient of services”** this not only excludes ‘spamming’ but may also excludes other material depending on the level of knowledge or intent which must be

---

<sup>74</sup> Cf, supra note 68 pp71-72

<sup>75</sup> <http://www.trevorcox.com/downloads/chaos-vs-uniformity.doc>. Chaos versus uniformity: the divergent views of software in the International Community Trevor Cox





applied to the request (e.g. when collecting emails the recipient is not actually 'requesting' specific mail, spammed or other unsolicited material).<sup>76</sup>

The word **"recipient"** means 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, transaction or other related interest. The service should be delivered on demand of the user.

A visit to a website is always a service on demand, since the recipient **"requests"** the website by typing the URL or by following a link. A standard example of a service that is not on demand is TV broadcasting, since the deliverance of the service does not depend on the request of the customer. One could well argue that this is also the case for WebTV, in particular for live reports, but the deliverance still is on demand because of the fact that one should visit a website before being able to watch WebTV<sup>77</sup>.

In order to provide guidance, the Transparency Directive<sup>78</sup> Appendix V<sup>79</sup> provides numerous examples of services that are not Information Society Services and E-Commerce Directive provide specific examples of what is and what is not considered an Information Society Service.

---

<sup>76</sup> Computer and Telecommunications Law Review 1999 Issue 8 E.U. Electronic Commerce Directive: August '99 amendments still avoid Consumer Internet Protection. M-T. Michèle Rennie

<sup>77</sup> Cf, supra note 68 pp71-72

<sup>78</sup> Member States may maintain or introduce stricter consumer protection measures than those laid down by the Community, as long as they are compatible with Article 3, not prejudicial to the free movement of information services and the Commission is notified of them. Article 19 endorses the need for co-operation between Member States and the Commission and builds upon the "Transparency" Directive, which extends to "the provision of information in the field of technical standards and regulations and of rules on Information Society Services" The Commission, therefore, has an important executive role, in detecting any need to protect Community interests, reducing Community rules to what is strictly necessary and, where appropriate, delaying the adoption of new national rules in order to help create a clear and stable EU legal framework. The system of prior consultation and administrative co-operation is intended to cover all new laws, regulations, professional codes or codes of practice or administrative provisions relating to electronic services.

<sup>79</sup> Indicative list of services not covered by the second subparagraph of point 2 of Article 1: "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's 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 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



#### **1.4.2 ANALYSIS OF THE CONCEPT UNDER THE CONDITIONAL ACCESS DIRECTIVE**

The Council Directive 98/84/EC of 20 November 1998 on the Legal Protection of Services Based on, or Consisting of, Conditional Access,<sup>80</sup> is broad in its coverage. According to article 1, “any service normally provided for remuneration, at a distance, by electronic means and on the individual request of a recipient of services”, irrespective of whether the receiver uses a television set, a computer screen or any other equipment.<sup>81</sup>

Seems obvious that the Conditional Access Directive incorporate the definition lay out in the Transparency Directive<sup>82</sup> with the single contrast that the Conditional Access Directive protects radio and television broadcasting services, and of particular interest for present purposes, Information Society Services.

The Directive intends to “approximate provisions in the Member States concerning measures against illicit devices which gave unauthorised access to protected services”.<sup>83</sup> In pursuit of this objective, the directive bans selected activities facilitating the circumvention of conditional access devices used in services protected. The Community law at present distinguishes between “broadcasting services<sup>84</sup>”, telecommunication services and “Information Society Services”.

---

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 89/525; (b) radio broadcasting services; (c) (televised) teletext.

<sup>80</sup> Council Directive 98/84/EC of 20 November 1998 on the Legal Protection of Services Based on, or Consisting of, Conditional Access 1998 O.J. (L 320) 54 [hereinafter Conditional Access Directive]

<sup>81</sup> Information Society Services are online professional services such as online banking, distance learning, stockbrokers, travel agents and health care services, interactive entertainment (video-on-demand and video games), online information services, electronic databases, electronic retailing, and electronic newspapers. A list of services which are not considered conditional access services can be found in the Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations and providing for regulatory transparency in the internal market for information-society services, Comments on the Articles, Art 1, Bulletin EU 7/8-1996.

<http://www.europa.eu.int/abc/doc/off/bull/en/9607/p103159.htm>.

<sup>82</sup> Council Directive 98/48/EC of 20 July 1998 Amending Directive 98/34/EC, art. 1.2(a), 1998 O.J. (L 217) 18, 21 Transparency Directive (laying down a procedure for the provision of information in the field of technical standards and regulations).

<sup>83</sup> Art. 1 of the Conditional Access Directive; the Council deemed it necessary to introduce a new article to precise the scope of the Directive

<sup>84</sup> The broadcasting service means a programme transmitted to the public. It can be a free to air programme or a Pay-TV programme, unencoded or encoded, but also radio broadcasting as well as so called Information Society Services that are offered on the basis of conditional access and against remuneration.



Looking into detail the definition fails by excluding any service lacking an interactive element.<sup>85</sup> Responses to the Green Paper by interested parties confirmed that this access control model is common not only to a wide range of broadcasting services but also to interactive services, regardless of the means of transmission.<sup>86</sup> The Commission made it plain in its initial proposal for a Directive on Conditional Access that it wanted a similar model to be viable for a broad range of services, and with the agreement of the European Parliament it expanded the proposed Directive to include Information Society services. Any other service falls within the definition of Information Society service and therefore within the Conditional Access Directive,<sup>87</sup> established in article 1:

**(1) “Any service”** Using the definition of “services” set forth in the European Community Treaty, the Regulatory Transparency Directive underscores the intended breadth of coverage by defining “at a distance,” “by electronic means” and “at the individual request of a recipient of services.”<sup>88</sup> Because the Conditional Access Directive extends legal protection to technology controlling access to “Information Society services,” thereby including within its scope information products traditionally used as inputs in creative and innovative uses and available with little in the way of access control, the EU Electronic Commerce framework is entering into uncharted territory, the wisdom of which remains to be seen.

---

<sup>85</sup> . While specifically excluded from being Information Society services because they lack the so-called “interactive” element, the Conditional Access Directive nonetheless protects services using point to multi-point transmission, including radio and television broadcasting services. An “indicative list” of services not covered by the definition of services is set forth in the Regulatory Transparency Directive, annex V. Recital 17 of the E-Commerce Directive, seeks further to clarify the definition of an Information Society service by stating that “those services referred to in the indicative list in annex V of Directive 98/34/EC which do not imply data processing and storage are not covered by this definition of Information Society services.”

<sup>86</sup> Conditional Access Directive Explanatory Memorandum-Provisional “The common feature is that access to the service at a distance is made conditional upon a prior authorization that aims at ensuring the remuneration of that service.”

<sup>87</sup> The Economic and Social Committee recommended that the Commission draw up positive/negative lists of existing services—thereby indicating included and excluded services, respectively—so as to have a clearer understanding and to avoid any ambiguity. Opinion of the Economic and Social Committee on the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, 1999 O.J. (C 169) 36, 39. In its amended proposal for the E-Commerce Directive, the Commission specifically added recital 2c to recital 3 to explain the scope of “Information Society service.” Recital 3 sets forth examples of what is and is not to be considered an “Information Society service.” Proposed E-Commerce Directive, recital 3, at 3. Included are online activities taking place via telephony and telefax services consisting of transmitting information via a communication network, providing access to a communication network, or hosting information provided by a recipient of the service. Services, which are transmitted point-to-point, such as video-on-demand or the sending of commercial communications by e-mail, are also Information Society services. . These two recitals have become recitals 17 and 18, respectively, in the E-Commerce Directive.

<sup>88</sup> “Service” in this context means any performance against payment, as defined in Article 50 of the EC Treaty. Treaty Establishing the European Community, Mar. 25, 1957, art.50 (as amended by subsequent treaties), [http://www.europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf)



It is evident that the Conditional Access Directive does not grant a property right in the “**protected service**” itself—whether such service consists of radio or television broadcasting services, Information Society services, or the provision of conditional access to any of these services as “a service in its own right.”<sup>89</sup> The Commission made this choice early on, intending to target piracy, defined as either illicit reception or unauthorized access, but did not consider applicable intellectual property rights as providing a sufficient degree of protection.<sup>90</sup> Moreover, the Commission saw the conditional access model as a business model to promote.<sup>91</sup> In its Green Paper on Encrypted Services, the Commission recognized that television and radio broadcast services are often offered to the public against remuneration (where such remuneration is ensured by a number of techniques that distinguish between “authorized” and “unauthorized” access).<sup>92</sup>

The Conditional Access Directive excludes from the definition of “Information Society services” any service provided in the physical presence of the provider and the recipient, or having material content (including “offline” services such as the distribution of CD-ROMs and software on floppy-diskette)<sup>93</sup>.

(2) “**.... Normally provided for remuneration**”, To gain protection under the Conditional Access Directive, any such service must be offered for remuneration, using, for instance, a subscription

---

<sup>89</sup> Conditional Access Directive, art. 2(a), at 56 (setting forth definition of protected service). A “protected service” is one of a certain kind of service, as specified in the Directive, which is provided against remuneration and on the basis of conditional access. It is plain that the protection provided by the “protected service” is derived from the use of technology that enables conditional access to take place, and not by the law as such.

<sup>90</sup> The Green Paper on Encrypted Services contains a discussion of the choice between protecting the encoded service itself, thereby giving it the character of an absolute right, or banning “preparatory activities” relating to the manufacture, importation, distribution and possession—either for commercial purposes or for private use—and the commercial promotion and advertising of decoding devices used for pirating. Green Paper on the Legal Protection for Encrypted Services in the Internal Market, Consultation on the Need for Community Action, COM(96)76, at 23-31 [hereinafter Encrypted Services Green Paper], available at <http://europa.eu.int/en/record/green/gp004en.pdf>. The difference of approach impacts the extent of the protection, since under the first approach protection is absolute (covers all preparatory activities, be they for commercial or for private purposes) while under the second approach protection does not cover the behavior of individuals. The concern of the Initial Green paper was illicit reception and rights available through the Cable and Satellite Directive were interpreted not to be applicable. Noting that the Directive does not in any way assist operators in their fight against illicit reception, but recognizing that under certain conditions, rights holders could prohibit the unauthorized retransmission of their works).

<sup>91</sup> Conditional Access Directive, Explanatory Memorandum-Provisional. The memorandum indicates that the framework that is being created is meant to be flexible and includes any conditional access technology that is likely to be used.

<sup>92</sup> Green Paper on the Legal Protection for Encrypted Services in the Internal Market, Consultation on the Need for Community Action, COM(96)76, at 22-24

<sup>93</sup> A list of services which are not considered conditional access services can be found in the Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations and providing for regulatory transparency in the internal market for information-society services, Comments on the Articles, Art 1, Bulletin EU 7/8-1996. <http://www.europa.eu.int/abc/doc/off/bull/en/9607/p103159.htm>.



arrangement or a usage-related tariff.<sup>94</sup> However, this requirement is not likely to be strictly interpreted by a court because of the elaboration provided by the E-Commerce Directive.<sup>95</sup>

(3) “... **At a distance**”, It specifically intends to include services becoming more widespread in the online environment, such as pay-per-view, video-on-demand, electronic publishing, and music-on-demand.<sup>96</sup> The kind of services such as online professional services, online banking, distance learning, stockbrokers, travel agents and health care services, interactive entertainment (video-on-demand and video games), online information services, electronic databases, electronic retailing, and electronic newspapers, as long as the parties are not face to face or simultaneously present.

(4) “... **By electronic means**” irrespective of whether the receiver uses a television set, a computer screen or any other equipment. Therefore the directive does not apply e.g. to a pin code system of a mobile phone.

The term “Information Society Services”<sup>97</sup> covers not only online services but also services which are not considered to be neither broadcasting nor online services. No Information Society Services are traditional telecommunication services, for telecommunication services are not provided “by electronic means”, i.e. they are not provided via electronic processing systems.<sup>98</sup>

(5) “... **Individual request of a recipient of services**”. Regarding the ongoing convergence it will be difficult to draw a line between Information Society Services and telecommunication services, the same with the broadcasting system.

---

<sup>94</sup> Explanatory Memorandum to Communication from the Commission to the European Parliament

<sup>95</sup> Recital 18 of the E-Commerce Directive

<sup>96</sup> <http://europa.eu.int/-ISPO/-legal/-en/-converge/-condaccess.pdf> Explanatory Memorandum to Communication from the Commission to the European Parliament, the Council, and the Economic and Social Committee: Proposal for a European Parliament and Council Directive on the Legal Protection of Services Based on, or Consisting of, Conditional Access, (Provisional Version July 9, 1997), As explored in Part IV.A, the content at the core of the service misunderstood to be protected, inter alia, by copyright law.

<sup>97</sup> Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations and providing for regulatory transparency in the internal market for information-society services (amended Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (OJEE L 109, 26.04.1983), as last amended by Directive 94/10/EC (OJEE L 100, 19.4.1994)), Bulletin EU 7/8-1996. <http://www.europa.eu.int/abc/doc/off/bull/en/9607/p103159.htm>

<sup>98</sup> 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, (OJEE L 217, 05.08.1998, 18-26), Comments on the Articles, Art. 1



The Member States efforts to adapt to rapid technological development have vindicated the decision to extend the notification procedure to Information Society services<sup>99</sup>. The Commission is now studying the possibility of broadening the scope of the Directive to include service sectors other than on-line activities. The procedure also needs to be applied as broadly as possible during the countdown to enlargement. Agreements designed to provide the applicant countries with a framework for participation in the procedure in the run-up to accession are currently being drafted.<sup>100</sup>

An increasing number of telecommunication companies expand their offer on the provision of additional value-added services such as information services, alarm calls, hotel reservation, and platforms for video conferences or even travel pilot services. Since these services are offered upon individual request, on a distance and by electronic means it could be argued that these services also qualify as Information Society Services as protected under the directive.<sup>101</sup>

By including Information Society Services, the Directive goes further than most of the existing national regulations, which are generally confined, to broadcasting services. Only a few Member States such as the Netherlands, Finland, the United Kingdom and Sweden have also included services other than broadcasting in their protection schemes. A consequence of the wide scope of the term “Information Services” and the unrestricted protection under the Directive is not only the uncertainty of the definition itself but also that service providers are invited to commercialize practically any content since nearly all services available upon individual request by electronic means will be protected. This possible effect of the directive would correlate with the intention of the directive to promote the development of a market for commercial electronic services.<sup>102</sup>

There is little question that the Directive broadly covers services, particularly those of increasing importance in the online environment. In this regard, it is relevant that the definition of “Information Society service” only became finalized with the Regulatory Transparency Directive of

---

<sup>99</sup> See the Commission report of 13 February 2003 IP/03/227, on the functioning of Directive 98/34 in the field of Information Society services.

<sup>100</sup> The report, which will be published in the Official Journal of the European Union, is available on the following Internet site: <http://europa.eu.int/comm/enterprise/tris/>

<sup>101</sup> Institute for Information Law, Protection of technological measures, Imprimatur Study, Amsterdam, November 1998, p. 44.

<sup>102</sup> <http://www.ivir.nl/publications/helberger/HackingBskyB.html> Hacking BskyB: The legal protection of conditional access services under European law Published in Entertainment Law Review, 1999-5, p. 88 [Natali Helberger](#)



July 1998.<sup>103</sup> The Commission makes clear that the Conditional Access Directive only indirectly protects radio and television broadcasting services and Information Society services which may or may not contain copyrighted material.<sup>104</sup>

The E-Commerce Directive of June 2000 reveals, however, that the scope of the definition continues to be a work in progress. Although the 1996 Green Paper on Encrypted Services included this term, one can argue that given the state of technological development at that time, the subject matter of “Information Society services” extended to the type of service which features primarily passive consumption on behalf of the user public (e.g., radio and television broadcasting services also protected under the Conditional Access Directive).<sup>105</sup> Due to the flexibility inherent in the definition of “Information Society service,” the term now includes services potentially incorporating information products traditionally available in libraries or book shops, professional services, health product i.e., information products which feature more active use and reuse on behalf of the general public.

Moreover, the passive type of use and consumption featured as part of the cinema and theatre access control model underlying the Conditional Access Directive is not convincing for the types of works already available on the Internet. This model is even less convincing when applied to the

---

<sup>103</sup> Regulatory Transparency Directive, art1.2. The Green Paper on Encrypted Services of 6 March 1996 also refers to Information Society services and defines them as “services provided electronically at a distance on the individual demand of a service receiver (video-on-demand, supply of games on demand, interactive teleshopping).” Encrypted Services Green Paper, *idem supra* note 97, at 6-7.

<sup>104</sup> Explanatory Memorandum to Proposal for a European Parliament and Council Directive on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society of 10 December 1997, COM(97)628 final at 2 [hereinafter CRD-Initial Proposal] (“consultation following the Green Paper confirmed that the existing Community framework on copyright and related rights, although not explicitly shaped for the features of the Information Society, will be of crucial relevance for this new technological environment. However, it needs adaptation...”). The crucial role of intellectual property rights and the need for legislative measures to protect it is made explicit in several policy documents. See Europe’s Way to the Information Society: An Action Plan From the Commission to the European Council, COM(94)347 final; the Bangemann Report on “Europe and the Global Information Society—Recommendations to the European Council,” at <http://www.bookmarks.de/lib/politics/bangemann>; Copyright and Related Rights in the Information Society of 19 July 1995, COM(95)382 final [hereinafter Copyright Green Paper], and the follow-up thereto; Follow-up to Green Paper. The importance of presenting legislative measures in the area of intellectual property was again highlighted in the Commission’s policy communication, A European Initiative on Electronic Commerce, COM(97)157 final

<sup>105</sup> The Directive does not prohibit acts of circumvention or other preparatory acts for merely private noncommercial purposes. In the Commentary to Article 3 (Article 4 of the final Directive), it is stated that the approach is “sanctioning the commercial activities that favor the unauthorized reception, and not the unauthorized reception as such.” CAD Explanatory Memorandum Provisional. In terms of a basis for the list of prohibited activities, the Commentary states that the list “is mainly based on Principle I of Recommendation R (91)14 of the Council of Europe. This Recommendation makes a clear distinction between possession for commercial and for private purposes: the former is declared as unlawful, while the latter is not.” It is left as an option for Member States to decide whether to prohibit the possession of illicit devices for private purposes. See also Recommendation No. R (91) 14 of the Committee of Ministers to Member States on the Legal Protection of Encrypted Television Services, available at <http://www.coe.fr/cm/ta/rec/1991/91r14.htm> [hereinafter Recommendation No. R (91) 14].



type of information products that soon will be provided as part of Information Society services. Why should we now consider “providers of protected services” any differently? This query is particularly important because the Directive, in extending its coverage to Information Society services, is likely to apply to the vast majority of content appearing on the Internet. The nature of the underlying rights scheme matters greatly, especially in this environment. For creators and innovators, copyright law remains best suited to promote overall innovation and its applicability must be assured vis-à-vis alternative rights structures including that recognized by the Conditional Access Directive.

In contrast, in the digital environment an information product need not be widely or readily accessible for passive consumption or reuse. When offered as part of an Information Society service, such products may only be intermittently available, and therefore not as easily accessible as copyrighted works traditionally have been in the tangible world. Gaining access in order to apply any limitations and exceptions becomes an issue especially where the rights owner through contractually specified provisions, or through the use of technology, which permits some, uses and prevents others, defines authorized use. In addition, gaining access in an environment rife with technological gate-keeping devices may well require the availability of technological devices enabling a user to benefit from limitations and exceptions and the law must also take this into account.<sup>106</sup> To be sure, a difficult legal challenge lies ahead: while it is understandable that rights holders want compensation for any use of their information products, limitations and exceptions which promote creation and innovation cannot be undermined as a result.

#### **1.4.3 ANALYSIS OF THE CONCEPT UNDER THE E-COMMERCE DIRECTIVE**

When it comes to the analysis the E-commerce Directive deals with a broader notion than “electronic commerce”. It addresses the harmonization of selected legal issues pertaining to the “Information Society Services”. The Directive outlines the scope of Information Society Services with reference to EU Directive 98/34 EC as we already mentioned above that lays down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/84 EC on the legal protection of conditional access. A more detailed

---

<sup>106</sup> The definition of “illicit device” under the Conditional Access Directive, for example, only refers to the “authorization of the service provider.”





analysis of services deemed to constitute Information Society Services under the Directive could be found in the recitals preceding the wording proper of the Directive.

Finally the E-commerce Directive followed logically from the Commission's action plan to dismantle obstacles to the free movement of goods and services. The Recitals identified the lack of a coherent regulatory framework to be primary obstacle to the free movement of Information Society Services between Member States.

The task of removing the existing anomalies and achieve a regime in which service providers, operating within the framework of law in their home countries, would be able to offer Information Society Services to any client elsewhere in the EU. Together, these harmonization measures were intended to remove all legal obstacles arising from differences in Member State legislation and, in conjunction with the existing Community *acquis*, ensure the free movement of Information Society Services within the Community. The E-commerce Directive was, therefore, based firmly upon the internal market principles of "mutual recognition" and "country of origin control" and the free movement of services<sup>107</sup>. In securing an internal market for on-line services, it was recognized that additional harmonization of certain aspects of existing Community law would also be necessary.<sup>108</sup>

The Explanatory Memorandum to the Recommendation<sup>109</sup> seeks to justify its use of the term "new communication and information services" without actually defining those services: "...This term or similar variants are widely used, commonly referring to digital communications and information services, such as the Internet with its World Wide Web and E-mail. The express mention of the Internet is avoided by the Recommendation, because of the rapid and unpredictable technological development in this field and the possible limitation, which might result from an exclusive reference to the Internet. The word 'new' indicates this recent and on-going development, although some aspects of this development might not be qualified as new in the near future. In the light of the descriptive nature of the term, member States have the discretion to be more specific in accordance with their national circumstances and policies. It must be acknowledged, however, that the word

---

<sup>107</sup> On one side, possible restrictions are therefore very limited –on grounds of public order, criminal investigations, public safety, public health, national defence, human dignity, non-discrimination principle or the protection of youth and childhood-; on the other, no prior authorisation is required for the provision of ISS.

<sup>108</sup> Pearce Graham, *REGULATING ELECTRONIC COMMERCE IN THE EUROPEAN UNION*, Aston Business School, Aston University, Birmingham, January 2001 ISBN No: 1 85449 501 1 pp7

<sup>109</sup> COM (99)112 – extract, 30 July 1999, <http://cm.coe.int/reports/cmdocs/1999/99cm112ext.htm>.



‘Internet’ is commonly used as a generic term for these new communication and information services.”<sup>110</sup>

In the case of the E-commerce Directive is a colloraly of the two previous analyzed Directives. The definition of “Information Society Services” is established in article 2(a)<sup>111</sup>: “Information Society Services”: services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. In other worders the Directive makes a direct reference to the previous analysed Transperency and Conditional Access Directive. The Directive recognises that “Information Society Services” are neither broadcasting nor telecommunications services and so should not be subsumed into existing inappropriate telecommunications or broadcasting regulations. The instrument defines “Information Society Services” as all existing or new types of services that will be provided at a distance, by electronic means and on the individualised request of a service receiver.

As I established the approach of the E-Commerce Directive is limited in a number of ways. The exclusions of certain areas and activities create significant complexity and even uncertainty, because the excluded areas are governed by other laws, which may apply different aspect generating conflicts among legislation.

Together with a ambiguos vision of the “Information Society Services”, which, may be defined as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing ...and storage of data, and at the individual request of a recipient of a service”. Information Society Services do not include all commercial activities carried on “at a distance” but only those carried on by ‘electronic’ means.

One possible way of resolving definitional difficulties would be to focus on the increasingly accepted observation that the individualized nature of Information Society Services precludes them from being categorized as broadcasting services. As narrow, straightforward definitions of these two distinct types of services are mutually exclusive, there would appear to be no justification for subjecting them to the same regulatory regime. The question of the adaptability of the existing regulatory framework therefore does not arise.

---

<sup>110</sup> COM (99)112 – extract, 30 July 1999 para.8

<sup>111</sup> Directive on Electronic Commerce 2000/31/EC, Official Journal L 178 , 17/07/2000 P. 0001 - 0016



For example, the Directive includes services provided over the Internet, by solicited e-mail, and interactive television, but does not cover services provided by telephone or fax, even though many telephones and faxes are digital, which according to the definition these last two could be considered to be a kind of Information Society Services. The precise definition relates back to previous EU Directives<sup>112</sup>, finding this specific point the source of most conflicts and the complexity itself, when it comes to the understanding of information society services.

I can't deny the fact that this approach does create considerable uncertainties. The exclusions and confusions are regrettable, given the fact that the Internet, telephone and fax are often used in conjunction with each other, and sometimes in connection with a computer like the program "bitware" for fax over the computer in connection with Internet program.

The E-commerce Directive states categorically that radio and television broadcasting (as defined in the Television Without Frontiers Directive) may not be brought within the definitional ambit of "Information Society Services" as they "are not provided at individual request."<sup>113</sup> It thus makes the distinction between broadcasting, *stricto sensu*, on the one hand, and point-to-point services, such as video-on-demand and the provision of commercial communications by electronic mail (which it holds to be 'Information Society Services'), on the other<sup>114</sup>.

As a form of illustration of the confusion and the undeniable dilemma with the definition of the Information Society Services, is the case of a company named Mediakabel which offers a pay-per-view service by the name of Filmtime, which is "any service normally provided for remuneration, at a distance, by electronic means and on the individual request of a recipient of services". "The conflicting views concern the definition of such a service and reflect different stakes: the question is whether it should be considered a television broadcasting service or an interactive service. Defining it as a television broadcasting service would not only mean Filmtime is subject to the requirements of the TWF Directive, in particular the obligation to reserve a certain percentage of time to European works, but also that it lies within the Media Authority's scope of competence. According to Mediakabel, Filmtime should be classified as an Information Society Service because it is only

---

<sup>112</sup> Meaning the Transparency Directive and The conditional Access Directive

<sup>113</sup> E-commerce Directive recital 18 of the Preamble, OJ L 178, 17 January 2000.

<sup>114</sup> Does the Existing Regulatory Framework for Television Apply to the New Media? LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, Ed. IRIS plus, Issue 2001-6



accessible upon individual request by means of an individual key. Although it recognizes Filmtime presents certain characteristics of an interactive service (it is offered at a distance, using partly electronic transmission), the Court has dismissed this argument. The Court notes such a service is not commanded individually by an isolated recipient who has free choice of programmes in an interactive setting, rather it is the service provider who establishes the list of films available and broadcasts it at the same time and on the same terms to an indeterminate number of viewers. The individual key is merely a tool to “unencode the images” simultaneously broadcast to all subscribers.”<sup>115</sup>

The seminal character of the aforementioned definition of Information Society Services may also be measured by its ability to transcend institutional barriers and gain acceptance in the Council of Europe; an achievement which it can boast already<sup>116</sup>. For instance, the definition of 'Information Society Services' used in the Council of Europe's Draft Convention on information and legal co-operation concerning “Information Society Services,”<sup>117</sup> is identical to the one elaborated in Article 1(2) of Directive 98/34/EC, as amended by Directive 98/48/EC. The aim of the Draft Convention is to “set up a legal information and co-operation system in the area of new communication services following the example of Directive 98/48/EC.”<sup>118</sup> Article 2 of the Draft Convention retains, as an integral part of its definition of Information Society Services, the three cumulative criteria stipulated in the corresponding definition in amended Directive 98/34/EC (“at distance”, “by electronic means” and “at the individual request of a recipient of services”). The Draft Convention did not even divest itself of the economic element to the original definition (“any service, normally provided for remuneration ...”); a defining feature of the EU's traditional approach to such matters, as opposed to the pro-freedom of expression character of the Council of Europe's approach. It should be noted, en passant, that the definition of “Information Society Services” in the European

---

<sup>115</sup> Case *Mediakabel BV / Commissariaat voor de Media* case n° C-89/04 On 2 June 2005, the European Court of Justice has, in a case taken by the Dutch company Mediakabel against the Commissariaat voor de Media (Dutch Media Regulatory Authority), rendered a decision with implications as to the scope of the Television without Frontiers Directive 89/552/EEC (as amended by Directive 97/36/EC).

<sup>116</sup>McGonagle: *Tarlach Does the Existing Regulatory Framework for Television Apply to the New Media IRIS Plus* (Supplement to IRIS - Legal Observations of the European Audiovisual Observatory 2001-6).

<sup>117</sup> The text of the Draft Convention is contained in the request for an opinion from the Committee of Ministers, Parliamentary Assembly Doc. 8982 of 22 February 2001, available at: <http://stars.coe.fr/doc/doc01/EDOC8982.HTM>

<sup>118</sup>CF supra 108 Para. 1, Explanatory Report to the Draft Convention



Convention on the Legal Protection of Services Based on, or Consisting of, Conditional Access<sup>119</sup> has a similar economic coloration, at least when examined in the light of its Explanatory Report.<sup>120</sup>

The genesis of the Convention is candidly traced in its Explanatory Report back to Directive 98/48/EC. The overall tenor of the Explanatory Report would suggest that the guiding principle of the drafting process was to produce a text that would facilitate the harmonious and complementary interaction of the law of two intergovernmental organizations<sup>121</sup>. The Report states: “It is clear that European Community legislation and international law need to evolve in this context as far as possible together and to this end, the two legal instruments need to have similar legal scope. As directives are binding legal instruments within the European Community legal order as far as the objectives are concerned, a convention-type binding international legal instrument appears to be the most appropriate Council of Europe instrument from an international law point of view.”<sup>122</sup>

Pursuant to the recitals, information spans a wide range of economic activities that take place online. In particular, such activities consist of selling goods online. But The E-Commerce Directive also enumerates different types of specific activities that that are not included in the definition Information Society Services: (1) delivery of goods, (2) off-line services, (3) radio broadcasting, (4) personal e-mails, and (5) a contract between an employer and an employee, (6) TV when not provided on individual request of the service user or tele-text services and similar, such as electronic programme guides offered by TV platforms.<sup>123</sup>

Beyond examples, the E-Commerce Directive also carves out specific fields of activities that are not Information Society Services. The fields of activities that are exempted include (1) requirements applicable to the goods as such, (2) requirements applicable to the sale of goods, and (3) requirements applicable to services not provided by electronic means.<sup>124</sup>

We need to mention that the E-Commerce Directive lists examples of activities that are Information

---

<sup>119</sup> Adopted on 24 January 2001, E.T.S. 178.

<sup>120</sup> See, in particular, para. 17 of the Explanatory Report to the Draft Convention

<sup>121</sup> McGonagle: Tarlach Does the Existing Regulatory Framework for Television Apply to the New Media IRIS Plus (Supplement to IRIS - Legal Observations of the European Audiovisual Observatory 2001-6.

<sup>122</sup> Para. 3, Explanatory Report to the Draft Convention on information and legal co-operation concerning “Information Society Services,” also contained in Parliamentary Assembly Doc. 8982,

<sup>123</sup> Koenig Michael, Die Qualifizierung von Computerprogrammen als Sachen im Sinne des Sec. 90 BGB Neue Juristische Wochenschrift, 2604, 2605 (1989).

<sup>124</sup> Recital 3 E-commerce Directive



Society Services. These activities include contracts where the service provider is: (1) providing on-line information, (2) the means to research and retrieve data from the Internet, and (3) point to point transactions, including video on demand, and commercial communications by e-mail or by any other equivalent means of electronic communication for reasons beyond the economic activity of those who are using them, (4) include services consisting in the provision of browsing and search products in information networks. Many telecommunications operators now offer value-added interactive services, such as information services (traffic, weather, etc), wake-up calls, platforms for video conferences or hotel reservation. Although these services are offered upon individual request, on a distance and by electronic means, in order to fall under the scope of the Directive they would also have to be paying services and based on a conditional access technique.

Finally we can also find definition of the Information Society Services recital 17 of the E-commerce Directive<sup>125</sup> (...) which 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. In recital 18 establishes that Information Society Services span a wide range of economic activities, which take place on-line. (...) The key term here is “economic activity”. “The difficulty here is that it is relatively easy to think of Web services that do not represent an “economic activity”, an academic Web page that consists merely of links for example. The other possibility is that this would be construed as an Information Society Services because such pages are “normally” provided for remuneration. But this gives rise to further questions. Should “normally” be construed by reference to practice on the Web or by reference to practice in the real world?”<sup>126</sup>

---

<sup>125</sup> 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') Official Journal L 178 , 17/07/2000 P. 0001 - 0016

<sup>126</sup> Michael Chissik and Alistair Kelman Electronic Commerce Law and Practice ED Sweet and Maxwell pp 316



## CHAPTER 2 CRITICS TO THE APPROACH OF INFORMATION SOCIETY SERVICES

Tellingly, the Commission has noted that it has not “received any objections [regarding Member States’ failure here] from economic operators, probably because of ignorance of the extension of the scope of Directive 98/34/EC to include Information Society services”<sup>127</sup>

The E-commerce Directive emanated from, and was led by, the Internal Market Directorate of the Commission, rather than its Information Society Directorate, which was responsible for telecommunications and IT, and here played only a relatively minor role. Though not unusual in the history of EU communications policymaking (see for example initiatives in broadcasting policy), this leadership ensured that the initiative was focused from the outset on commercial issues, notably the creation of a single European market in electronic commerce. In its work, the Commission was very much aware of the novel nature of e-commerce and was keen to ensure that no disruptive or retardate legal obstacles to its growth and functioning would be put in place<sup>128</sup>

The adoption of the E-commerce Directive marks a further important step towards the pooling of regulatory policy in Europe in response to technological change and international trade liberalization. It has twin aims - to clarify the application of key internal market principles to Information Society Services and to supplement the existing *acquis* through harmonization in specific, relevant areas. They are seen as vital ingredients in removing barriers to the development of e-commerce and contributing to the development of the internal market. E-commerce and the economic liberalization it induces and legal protection for consumers and providers are, therefore, interrelated. The regulation of e-commerce is important to business because it helps to manage potential conflicts and encourages consumer trust in the new technology. Moreover, the Directive symbolizes the EU’s commitment to the “new economy” and because of its market power; it provides the EU with considerable leverage in international for a responsible for regulating e-commerce.<sup>129</sup>

---

<sup>127</sup> European Commission, “Report from the Commission to the European Parliament and the Council. Evaluation of the Application of Directive 98/34/EC in the Field of Information Society Services, Brussels, Com (2003) 69 final, February.

<sup>128</sup> Mueller, Milton (2002), *Ruling the Root – Internet Governance and the Taming of Cyberspace*, Cambridge: MIT Press.

<sup>129</sup> Pearce Graham *REGULATING ELECTRONIC COMMERCE IN THE EUROPEAN UNION*, Aston Business School, Aston University, Birmingham, B4 7ET, UK RP0102 January 2001 ISBN No: 1 85449 501 pp20



The E-commerce Directive establishes a corpus of European law that seeks to regulate the new technologies in a way that reconciles the rights and interests of consumers and Information Society Service providers. It applies a novel approach, through the adoption of the internal market model, which is non discriminatory in terms of access to markets in other Member States, but flexible in the obligations it imposes on service providers within individual states. The Directive provides a pragmatic solution to regulating e-commerce in the EU, which is intended to foster market integration and allows for variations in consumer policies within Member States. However, the accent on flexibility 'may lead to a continued lack of harmony in certain areas, rather than consistency across the single market'<sup>130</sup>

While the Directive is an important step towards guaranteeing the free movement of on-line services within the EU, developments in telecommunications, broadcasting and information technology have far-reaching implications, including taxation, competition, intellectual property, data protection and employment. Thus, while the controversy about the potential implications for e-commerce of changes to private international law, in the form of the Brussels Convention, proved to be unfounded, it did underline the need for policy co-ordination. The need for a seamless approach to regulation was strongly endorsed by the European Parliament in its first reading on the Directive. The implication is that the EU needs to ensure mechanisms are in place to co-ordinate current and future activities relating to Information Society Services.<sup>131</sup>

In turn, Member States may not restrict the freedom to provide services, i.e. may not take measures which hamper or otherwise make less attractive the provision of Information Society Services from other Member States to their territory, unless such measures are covered by one of the derogations provided in the text of the directive as set out below. These measures must, obviously, be in conformity with the EC Treaty. The E-commerce Directive complements the sectoral directives and is without prejudice to the level of protection established by these directives and national legislation implementing them in so far as this does not restrict the freedom to provide Information Society Services.<sup>132</sup>

---

<sup>130</sup> Rowe, H. (1999) E-commerce policy developments in the UK and the EU, *Computers and Law*, 10, 2, 21-26.

<sup>131</sup> CF supra 124 pp 23

<sup>132</sup> REPORT ON E-COMMERCE AND FINANCIAL SERVICES TO THE FINANCIAL SERVICES POLICY GROUP ANNEX III: POINTS OF CLARIFICATION pp12





## **2.1. UNDERSTANDING OF THE FREE MOVEMENT OF SERVICE AND THE TERM SERVICE BY ITSELF**

Under the EC Treaty, the freedom to provide services is a fundamental right for all EU citizens and any restrictions on this are generally prohibited. The key point of the “Information Society Service” definition established in article 2(a) E-commerce Directive, is the term “**service**”, which refers to a service within the meaning of Article 50 EC Treaty<sup>133</sup>, i.e. according to interpretation by the Court of Justice a service which is normally provided for remuneration but not necessarily remunerated by the recipient of the service<sup>134</sup>.

This point is reemphasized in the proposal “Electronic commerce consists of Information Society Service activities. These consist of a large variety of online services, for example, the sale of goods or services or the free provision of information remunerated by commercial communication.

These services do not develop in a legal vacuum; they are already subject to a series of national, Community or international rules. However, having regard to the aims of the Internal Market (Article 7a of the EC Treaty<sup>135</sup>), the principles of freedom of establishment (Article 52 of the EC Treaty) and of the freedom to provide services Articles 50<sup>136</sup>, certain aspects of the existing legal framework must be clarified in order to increase legal security. Indeed, certain legal barriers hamper the exercise of these freedoms by an Information Society Service provider, or a citizen using these services or make their exercise less attractive.<sup>137</sup>

---

<sup>133</sup> Ex-Article 60 of the EC Treaty

<sup>134</sup> Jens Fejø, Ruth Nielsen og Thomas Rus; Legal Aspects of Electronic Commerce. Article : “Directive on Electronic Commerce (2000/31/ec)” By Pia Lindholm and Frithjof A. Maennel pp16-17

<sup>135</sup> Case C-186/87 Cowan v Trésor public [1989] ECR 195 “Under Article 7 of the Treaty the prohibition of discrimination applies 'within the scope of application of this Treaty' and 'without prejudice to any special provisions contained therein' . This latter expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations. Examples of that are the provisions concerning free movement of workers, the right of establishment and the freedom to provide services.”

<sup>136</sup> Activities involved in Information Society services constitute both services within the meaning of Articles 59 and 60 of the Treaty and information within the scope of the principle of freedom of expression laid down in Article 10 of the European Convention on Human Rights. These activities may therefore qualify for protection under the principle of freedom to provide services, freedom of establishment and freedom of expression. Case C-20/92 Hubbard [1993] European Court reports 1993 Page I-03777 case para 11-14

<sup>137</sup> Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on “A European initiative in electronic commerce” A4-0173/98. pp 8



However, under Article 55 of the EC Treaty, member states are entitled to impose certain limited restrictions on persons providing services from other Member States. The courts have interpreted these permitted restrictions narrowly. They are generally related to public policy, public security or public health. In the same vein, Article 3 of the Directive provides that the E-commerce Directive complements Community law without prejudice to the level of protection offered for, in particular, public health and consumer interests. Community laws can be implemented in so far as they do not restrict the freedom to provide Information Society Services. The so called “restrictions test” introduces a further level of uncertainty to the application of the E-commerce Directive. For example, the UK Treasury has taken the view that the market abuse regime under the Financial Services and Markets Act does not impose a restriction on the freedom to provide Information Society Services and that therefore the market abuse rules continue to apply to inbound providers of financial services.<sup>138</sup>

The case law also develop the term service in the Hubbard<sup>139</sup>; “In order to do so, it is necessary, according to the reasoning which the Court habitually uses, to establish that the activity in question must be described as a provision of a service, that the national measure concerned restricts the freedom to provide that service and lastly that that restriction is not justified by any general interest”.<sup>140</sup>

The provision of a service within the meaning of Articles 50 of the EC Treaty<sup>141</sup>, I would refer to the pragmatic definition and the characteristics of that concept as they emerge from the judgment in Webb.<sup>142</sup> “According to the wording of the first paragraph of Article 50 of the Treaty the expression “services” means services which are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons (...)”<sup>143</sup>. Those essential requirements abolish all discrimination against the person providing the service by reason of his nationality or the fact he is established in a Member State other than that in which the service is to be provided (...)”<sup>144</sup> “The ...aim of the third paragraph in Article 50 is to enable the

---

<sup>138</sup> E-BUSINESS IN THE UNITED KINGDOM THE BASIC LEGAL FRAMEWORK ALAN HAWLEY SOLICITOR MEDIA & TECHNOLOGY GROUP RICHARDS BUTLER October 2004

<sup>139</sup> Same idea is provide in paragraph 1 Case C-20/92 Hubbard [1993] European Court reports 1993 pp I-03777

<sup>140</sup> See, inter alia, Case 352/85 Bond van Adverteerders v Netherlands State European Court reports 1988 pp 2085.

<sup>141</sup> Ex-Article 60 of the EC Treaty

<sup>142</sup> Case 279/80 Webb European Court reports 1981 pp 3305

<sup>143</sup> Cf. supra 134 para 8

<sup>144</sup> Cf. supra 134 para 13



provider of the service to pursue his activities in the Member State where the service is given without suffering discrimination in favour of the nationals of that State.”<sup>145</sup>

Accordingly, that definition must be regarded as covering the task carried out for remuneration in a Member State by a member of a profession established in another Member State which consists in seeking, in the interests of the successors of his deceased client, to obtain possession of the assets which that client held on the territory of the first State. In that respect, it is irrelevant whether the provider of services acts “in his own name”, as the national court states, or in the name of the deceased’s successors. In the latter case, it would be necessary to take into consideration the status of the latter as recipients of services.<sup>146</sup>

In that respect, adopting the wording of the judgment in *Webb*, the Court held in *Saeger v Dennemeyer*<sup>147</sup> that “as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives”.<sup>148</sup>

In the *Wirth Case*<sup>149</sup> “As the Court has already emphasized in *Belgian State v Humbel*<sup>150</sup>, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the

---

<sup>145</sup> Cf. supra 134 para 14. See also Case C-76/90 *Saeger v Dennemeyer* [1991] ECR I-4221.

<sup>146</sup> In that respect, the Court has held that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions ... (Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 16). See also *Cowan v Trésor public*, paragraph 15. Consequently, whether it is the provider of services himself or the successors in title who act on the territory of another Member State through the intermediary of the provider, the situation resulting from a provision such as the one under consideration is equally restrictive: either the successors must give security or they must restrict their choice to a provider of services who is a national of the State in which the court is situated

<sup>147</sup> Case C-76/90 *Saeger v Dennemeyer* [1991] ECR I-4221 Para 16.

<sup>148</sup> Cf. supra 139 para 15. It would note that, although this form of words is the one that the Court commonly uses to explain the justification for an obstacle to the freedom to provide services, it has also held in particular in *Bond van Adverteerders* that in certain cases that justification may be based on grounds of public policy within the meaning of Article 56 of the Treaty.

<sup>149</sup> Case C-109/92 *Wirth* [1993] European Court reports 1993 Page I-06447

<sup>150</sup> Case 263/86 *Belgian State v Humbel* [1988] ECR 5365, at para. 17, 18 and 19



service. In the same judgment the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.”<sup>151</sup>

## **2.2 BORDERLINES OR DISTINCTION BETWEEN INFORMATION SOCIETY SERVICES, TELECOMMUNICATION SERVICES AND BROADCASTING SERVICES SO CALLED “TRIPLE PAY**

The convenient, wide-embracing term, “new media services”, is generally regarded as being synonymous with the term 'Information Society Services even digital goods, or services. It is striking that none of the traditional media-specific standards apply to these services under the E-commerce Directive.

During my research, it became more clear the juxtaposition of terminology when is related to modern technology changes, digital aspect. In fact the continuous trend is to push to the edge the meaning of Information Society Services, in conjunction with other aspects that involve telecommunications and broadcasting services that can be provide over the Internet.

European cultural diversity must be recognised and exploited in creating an Information Society for all. Public authorities can accelerate an Information Society, as legislators, regulators, promoters, and public procurement agencies. They must ensure that legislative and regulatory conditions create a favourable environment for business that attracts investment and favours innovation and economic development, as well as safeguards the interests of consumers. They can take the lead in encouraging demand for Information Society services by offering their public services on-line and by following public procurement policies that favor openness and interoperability.

---

<sup>151</sup> CF. supra 15



In June 2002, the Seville European Council re-iterated the request of the Barcelona Summit to the Commission for a report to the Copenhagen European Council in December 2002 on “the remaining barriers to open platforms in digital television and third-generation mobile communications”<sup>152</sup>. This document is a preliminary response to the above request, identifying not only “barriers to open platforms”, but also many other issues that will affect access to Information Society services. A range of commercial, regulatory and consumer factors will influence the roll-out of 3G mobile services and digital TV and will therefore determine what services can be accessed from what devices - no less than the openness of a given platform.<sup>153</sup>

Erkki Liikanen, European Commissioner responsible for Enterprise and the Information Society remarked: “We know that our digital communications platforms like 3G and digital TV will be able in future to deliver virtually any electronic and Information Society Service. We also know that because not all platforms are the same, the precise capabilities of each delivery platform will differ, and individual consumers will use their services differently. To maximize the choice for consumers and provide flexibility for the market, open platforms for digital television and 3G mobile will be a key part of the commercial picture. In this Communication on interoperability of services, the European Commission addresses. Barriers to widespread access to new IT services and applications of the information society through open platforms in digital television and third generation mobile communications”. The document analyses how providing services over interconnected networks can involve the use of proprietary technology at the interfaces between services and applications and therefore have an impact on consumer choice.<sup>154</sup>

The Communication examines barriers to access to Information Society Services through "open delivery platforms" in third generation (3G) mobiles and digital television. An Information Society Service is a service, which involves "true interactivity", that is, interactivity, which is provided after a request by the user to the provider, usually over an electronic communications network, as opposed to a service such as teletext where users access material made available without the user needing to contact the provider. Information Society Services are delivered to devices such as 3G mobiles and digital television equipment over a similar software platform to that which Windows

---

<sup>152</sup> Council Presidency conclusions at: <http://ue.eu.int/en/Info/eurocouncil/index.htm>

<sup>153</sup> COMMISSION OF THE EUROPEAN COMMUNITIES Brussels, 3.12.2002 SEC(2002) 1333 COMMISSION STAFF WORKING PAPER Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications.

<sup>154</sup> Open platforms in digital television and 3G: Commission assesses state of play and charts way forward IP/03/978 Brussels, 9 July 2003 [http://www.fub.it/dvb/dvbt/PDF\\_files/openplatforms.pdf](http://www.fub.it/dvb/dvbt/PDF_files/openplatforms.pdf)



provides on a personal computer. Some of these software platforms are built according to open standards, whilst others use proprietary standards.<sup>155</sup>

Remove barriers in order to maximize the contribution of all technologies and infrastructures in order to see full development of the market for Information Society Services. There is disagreement amongst market players concerning the extent to which operators of some networks should be allowed to exercise commercial control over the content.

The success of the Internet, the network of networks, has come from its openness, interoperability and interworking. So far, walled gardens have either proved to be commercial failures or in violation of the *acquis communautaire*. If 3G and DTV are not open and thus not competitive, then we fear that they will fail to attract content and customers, thus they will not develop. The more platforms that can be encouraged to compete with each other, the greater will be the gains for the European economy. However, if the price differences remain high - sometimes more than an order of magnitude - then there may be little or no competition between those networks.<sup>156</sup>

### **2.2.1 BROADCASTING SERVICES**

Television broadcasting within the meaning of Directive EEC/89/552<sup>157</sup> and radio broadcasting are not Information Society services because they are not provided at individual request. Nor are activities such as the delivery of goods as such or the provision of services off-line considered Information Society services. Activities, which by their very nature cannot or rendering medical advice that requires the physical examination of a patient, are also not Information Society Services.

Information Society services can therefore cover: (1) on-line transactional services, e.g., buying goods on-line; and (2) information, research and other on-line services, e.g., travel timetables, catalogues, libraries, and interactive games<sup>158</sup>.

---

<sup>155</sup> <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxxviii/6317.htm>

<sup>156</sup> Green Paper on Convergence COM (1999)

<sup>157</sup> Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC 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 OJ L 202, 30.7.1997, p. 60.

<sup>158</sup> E-Government services, such as e-Learning and e-Health, are not provided for remuneration and may therefore fall outside of this definition, but they nonetheless do fulfill the other criteria of Information Society services. See: Cases 263/85, [1988] ECR 5365, 352/85 [1988] ECR 2085.



As I go deep into the clarification of the definition of “broadcasting services” is crucial to keep in mind the technological developments already mentioned, especially when digital technologies are making all platform more compatible with each other. It is important to precisely identify what constitutes a broadcasting service – irrespective of the technical modalities of transmission - as opposed to an Information Society Service, which should not be addressed by the same regulatory framework.

“Broadcasting services” need to be defined by their general conditions: broadcasting services are those that transmit, on a one to many basis, audiovisual content presented in a linear way, based on a program schedule under the control of a publisher, which means that the user has no influence on the program, in particular concerning chronology and theme of the content being offered<sup>159</sup>

For the European Broadcasting Union<sup>160</sup> considers that new Information Society Services will contribute to a cultural diversity, unfortunately, this seems to be based on hope rather than concrete market research. Together with the idea that new interactive services will, to a large extent, be complementary to traditional broadcasting services. Broadcasting services are probably the most important platform for the launch of new Information Society Services. In many programmes, such as sports events, documentaries, current affairs, advertising, etc., complementary information services will be provided as well as real interactivity.<sup>161</sup>

First of all, it should be stressed that when it comes to the “**television without frontiers**”(TWF)<sup>162</sup> Directive is “technologically neutral”, insofar as its provisions applies indiscriminately to analogue and digital television, regardless of broadcasting method (terrestrial, satellite, cable, etc.). Secondly, it should be recalled that positive Community law makes an important distinction between

---

<sup>159</sup> [http://www.etno.be/upload/download\\_files/9336/RD217%20-%20EIS-ACON%20TVWF%20Directive%20revision%20-%20first%20input.doc](http://www.etno.be/upload/download_files/9336/RD217%20-%20EIS-ACON%20TVWF%20Directive%20revision%20-%20first%20input.doc). June 2005 ETNO Reflection Document on the revision of the Television without Frontiers Directive

<sup>160</sup> [http://www.ebu.ch/CMSImages/en/leg\\_convergence\\_tcm6-4454.pdf](http://www.ebu.ch/CMSImages/en/leg_convergence_tcm6-4454.pdf)

<sup>161</sup> pp12 [http://www.ebu.ch/CMSImages/en/leg\\_convergence\\_tcm6-4454.pdf](http://www.ebu.ch/CMSImages/en/leg_convergence_tcm6-4454.pdf)

<sup>162</sup> COUNCIL OF THE EUROPEAN UNION Brussels, 13 January 2003 (13.01) 5191/03 AUDIO 1 COVER NOTE from : Secretary-General of the European Commission, signed by Mr Sylvain BISARRE, Director date of receipt : 8 January 2003 to : Mr Javier SOLANA, Secretary-General/High Representative Subject: Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers" Delegations will find attached Commission document COM(2002) 778 final.



“television broadcasting” services, which concern television programmers intended for the reception by the public, and “Information Society Services”<sup>163</sup>

European Commissioner for Education and Culture Viviane Reding said: "For the time being no Information Society Service has attained an importance or impact (...) that would have justified a complete change of the TWF Directive. Regulatory policy in the sector has to safeguard certain public interests (...). The wide-ranging consultation confirmed that these objectives are not called into question by technological or market developments. What is questioned are the means by which these objectives can be achieved in a changed environment."<sup>164</sup>

The digital interactive television is targeted (apart from the broadcasters) to all active users/citizens/businessmen that require access to the information society, by creating, manipulating and providing their own content. For this category, an appropriate reverse path is required so that to enable access at least to the most primitive Information Society services (i.e. Internet, e-mail, etc.), besides alleviating the Digital Divide. From the discussions carried out concerning the “Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications”<sup>165</sup>, surprising is the

---

<sup>163</sup> Thus, Article 1(a) of the “television without frontiers” Directive defines “television broadcasting” as “the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services”. Article 1(2) of 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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, defines an “information society service” as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”. This latter Directive explicitly provides that television services - within the meaning of the “television without frontiers” Directive - and broadcasting services are not information society services as they are not supplied on individual demand. Cf. Annex V, “Indicative list of services not covered by the second subparagraph of point 2 of Article 1”, to the Directive. <http://europa.eu.int/scadplus/leg/en/lvb/l21003.htm>; See also recital 18 of Directive 2000/31/EC. The definition of “information society services” also features 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, in 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, and in the Directive of the European Parliament and of the Council on the approximation of laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (political agreement of the Council of 2.12.2002 on the amended proposal of the European Parliament). Cf. Article 1, point 2, second paragraph, third indent of 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, as amended by Directive 98/48/EC of the European

<sup>164</sup>TV Without Frontiers Directive: The Commission's roadmap for revision

[www.euractiv.com/Article?tcaturi=tcu:29-114578-16&type=News](http://www.euractiv.com/Article?tcaturi=tcu:29-114578-16&type=News)

<sup>165</sup> Information Society Technologies (IST) Programme ATHENA “Digital Switchover: Developing Infrastructures for Broadband Access” Contract No FP6-507312

<http://www.ist-athena.org/Deliverables/ATHENA%20Deliverable%20D1.1.pdf>





access to “Information Society Services”, can be achieved only if “they are specified and required by the regulator under an extension of 'must carry' rules”. They also argue that the barriers will be removed if a requirement is arisen “on platform operators who wish to provide IP service capability via digital TV to facilitate open access to the Internet”, and if “some form of minimum common functional specification for browsers, preferably agreed within DVB” will be adopted, while making no reference on the pressing need and the vital importance of the reverse path in order to achieve even the simplest/basic Information Society IP facilities (Internet, e-mail). It is believed that Digital TV may ultimately rival the PC/Internet system for access to Information Society Services as it is widely implemented in Europe. For us this is not a reality but only a possible scenario as the PC model is widely extended for internet services, isn't costly at all being gettable for any consumer, is easy scalable regarding new demands and challenges, and its technology runs very fast offering stronger, smaller and cheaper devices. Furthermore using the PC model, one can also create services at his own, giving a dynamic character at its usage, and not only to use the offered services. For these reasons the market have to focus to open platforms not only between digital TV and 3G but also regarding the existing PC/Internet platform.<sup>166</sup>

Another argument in favor of seeking to develop a harmonized international regulatory approach to new technologies is the fact that some countries have developed content regulation for the new services, and other countries have not, or the existence of different regulatory approaches for the same technologies in different countries. For example, the broadcasting of programmes on the Internet is expressly included in the legal definition of broadcasting in Greece, but elsewhere it is not; in some countries web-TV is classified as TV, in others as an Information Society Services). Failure to move to this goal will result in a variety of different national regulations vis-à-vis the same services, making international cooperation more and more difficult.

Broadcasting services and Information Society Services are two contrasting poles that at same range tend to mix together. Already at first sight it can be recognized that there are a number of services for which the regulatory standards of broadcasting are too high, but on the other hand, for which the standards for the Information Society Services are too low. I am talking for instance of teleshopping services, different forms of online press or specialized TV programmes which go beyond the

---

<sup>166</sup> DigiTAG response to Commission Staff Working Document on Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications, page 2, 14/02/2003



traditional model of a TV programme. The latter are services whose public opinion-making potential is not regarded as being high enough to impose on them broadcasting-level regulations. On the other hand, these services are not comparable to simple e-commerce services as they do have a potential to influence public opinion. If you think of the regulation of the press it becomes apparent what I mean by this: there are some minimum standards concerning the protection of third parties and the safeguarding of pluralism, but which are far below the standards of the broadcasting sector.

From the perspective of broadcasting it is striking that the e-commerce-directive applies to a number of services which are traditionally attached to the broadcasting sector (at least in the Federal Republic of Germany), for example: video-on-demand services as well as Internet broadcasting, that is, television programmes which are distributed over the Internet. It is obvious that this regulation leads to contradictions with recognized regulatory principles such as the principle of technological neutrality, and therefore urgently requires a revision. Furthermore, maintaining the present classification of the Internet as a medium of individual communication is being questioned in the face of rapid technical developments in the area of digital media. I will come back to this point when I try to develop ideas for a European legal framework.

As I mentioned before the *Mediakabel*<sup>167</sup> helps once again to illustrate all the troubles and confusion in a delicate and tenuous borderline. Advocate General Tizzano takes the opinion that the technical criterion of point-to-point versus point-to-multipoint transmission is crucial for the qualification of a content service as “Information Society Service” or as television broadcasting service.

The discussion before the Dutch media regulator and courts concerned *Mediakabel*’s *Filmtime* service, which – according to *Mediakabel* – had to be qualified as “Information Society Service” for which no broadcasting license under the Media Act was needed. The Dutch media regulator, however, interpreted this service as near-video-on-demand (since the programmes were broadcast at regular intervals and hence not available for the viewer at any time), and considered the Media Act fully applicable.

The Advocate General confirms that near-video-on-demand constitutes a broadcasting service in the

---

<sup>167</sup> Cf. supra 107 Case *Mediakabel BV / Commissariaat voor de Media* case n° C-89/04



sense of the Television without Frontiers Directive: this follows unambiguously from annex V, point, 3, sub A of Directive 98/34/EC, which states that television broadcasting services “including near-video-on-demand” are excluded from the definition of Information Society Services. After that, he gives the Dutch authorities further guidelines to distinguish between broadcasting services and Information Society Services. Not relevant in his view is the encoded or unencoded form of the transmissions, or the remuneration scheme that is used. Neither useful is the analysis of competitive services (for instance, substitutability of near-video-on-demand by video-on-demand), nor the fact that some provisions of the Television without Frontiers Directive (such as the European quota) can only be applied to near-video-on-demand services in an ineffective manner.

The crucial element is whether the audiovisual data is sent to an individual receiver at his request (point-to-point), in which case the notion of “Information Society Service” applies or whether the data is transmitted without individual demand for simultaneous reception by an unlimited number of individual receivers (point-to-multipoint).

Although this technical criterion might, at first sight, be tempting because of its objective nature, we can wonder whether it is “future proof”. In this regard, it is interesting to note that the Belgian Constitutional Court abandoned a similar reasoning already in 2002, be it in the national context of the division of powers between the federal and regional authorities. Since in Belgium, the Flemish, French and German-speaking Communities are competent for radio and television broadcasting (including its technical aspects), on the one hand, and the federal legislator for telecommunications, on the other hand, the exact delineation of the notion of broadcasting is highly relevant to the various authorities. Not surprisingly, it has been subject of intense debate and many judicial disputes over the last years.<sup>168</sup>

Although the Constitutional Court initially used the same technical criterion of point-to-point versus point-to-multipoint transmission to make the distinction between telecommunications and broadcasting<sup>169</sup> it overruled this case law in 2002 by stating explicitly that the technical means of

---

<sup>168</sup> What is crucial in the eyes of the Belgian Constitutional Court is the intention of the sender and the degree of confidentiality of the message: if the content provider intends to make the audiovisual content available to the public at large (even if extra remuneration is needed) and if this content displays no confidential character, then the service is considered as broadcasting, even if it is offered at the viewer's individual request or via distribution means – such as point-to-point techniques – that were formerly not suited for broadcasting.

<sup>169</sup> Decision n° 109/2000 of 31 October 2000,



transmission do not constitute a decisive factor in the qualification of a service as broadcasting<sup>170</sup> This implies that truly interactive services (such as video-on-demand or web streaming) are to be considered broadcasting services in the Belgian constitutional context. The Flemish media legislation, for instance, requires a declaration (no license) for such services and imposes minimal conditions. Perhaps the Advocate General was left no other option than to draw the line between interactive-equaling- Information Society Services, on the one hand, and non-interactive-equaling-broadcasting services, on the other hand, since the E-Commerce and Television without Frontiers Directives are historically based on this distinction. It still remains to be seen whether the ECJ will follow this reasoning or not. In any case, the Belgian Constitutional Court demonstrates that there is another more evaluative and technologically neutral way to delineate broadcasting services.

### **2.2.2 TELECOMMUNICATION SERVICES**

Factors that could limit widespread access to electronic services in future go beyond those of open interfaces and open platforms. Technology barriers can be overcome wherever there is a strong commercial incentive to do so. But the creation of an Information Society means putting into place a series of measures, both technical and non-technical, to create the conditions necessary for an Information Society to happen.

As an Information Society gradually becomes more of a reality, the source of economic growth becomes increasingly information and knowledge-based. This shift in the drivers for growth has disturbed the traditional balance in society between openness, innovation and competition. The Barcelona European Summit pointed to the key role that third generation mobile communications (3G) will play in providing widespread access to interactive and Information Society services. The analysis presented in this document supports these conclusions.

The mobile telecommunications industry is evolving from being primarily voice telephony service providers (with extra features like SMS) to delivering a combination of voice, information and audio-visual services. Improved network technologies and software in 3G will improve the range of services and applications available, particularly by increasing the speed at which services will run over these networks. This will improve the usability and interactivity of services, such as booking of tickets, downloading of audio and video clips, banking and payment transactions and location-

---

<sup>170</sup> Decision n° 156/2002 of 6 November 2002.



based services, such as finding a local restaurant. The Commission's Communication of June 2002, "Towards the Full Roll-Out of Third Generation Mobile Communications"<sup>171</sup> reviews the past and current situation of the 3G sector from the financial, technical, market and regulatory perspectives. It pointed to the rapid growth in data traffic in the form of short message services (SMS), which points the way towards more sophisticated services making use of 3G.<sup>172</sup>

Consistent with the FCC's decision, the European Commission explicitly notes that computer-to-computer voice communication that never touches the existing circuit-switched PSTN does not fall under the regulatory framework. Services — such as Skype<sup>173</sup>, for example, that relies on PCs as access terminals and therefore do not offer a full substitute for voice telephony are viewed as an "Information Society Service" and are freed from conventional telecommunications regulation.

Only VOIP offerings that qualify as "communications services" fall under the EU framework or, if desired, even apply for the right to offer universal service under the USO category for a given jurisdiction. While no VOIP provider is likely to apply for the role as universal service provider particularly in the infancy of VOIP the Commission explicitly recognizes VOIP provider's right to qualify for this role or, if desired, even apply for the right to offer universal service under the USO category for a given jurisdiction. While no VOIP provider is likely to apply for the role as universal service provider particularly in the infancy of VOIP the Commission explicitly recognizes VOIP provider's right to qualify for this role<sup>174</sup>

### **2.3 COMPARISON BETWEEN TRADITIONAL AND ONLINE INFORMATION SOCIETY SERVICES**<sup>175</sup>

Jean Bergevin pointed out that when it comes to Information Society Services, the title is somewhat misleading. Jean Bergevin admitted in fact we're looking at the regulations of such services, rather than electronic commerce per se. "The Information Society Service, which is already being defined in our Transparency Directive, covers any service offered at a distance on the individual request of the consumer by electronic means. By electronic means, effectively means there's some element of processing at both ends. That's immense. If you want to see how immense, I would suggest you

---

<sup>171</sup> COM (2002) 301.

<sup>172</sup> <http://europa.eu.int/comm/eurostat/Public/datashop/print-product/EN?catalogue=Eurostat&product=1-ir031-EN&mode=download>

<sup>173</sup> Alberdingk Thijm, Door Christiaan Wat is VoIP (juridisch gezien)? <http://www.advocatie.nl/scripts/solvlog.dws?13>

<sup>174</sup> [http://www.firstmonday.org/issues/issue10\\_7/bach/](http://www.firstmonday.org/issues/issue10_7/bach/)

<sup>175</sup> SEE MORE EXAMPLES ANNEX FINANCIAL SERVICES



look at our Transparency Directive where in the annex we've listed what it doesn't cover. And it's not that long. It obviously doesn't cover broadcasting; we already had what was required in that area. It doesn't cover vocal telephony. But it certainly would cover, for example, if you had GSM based E-Commerce services, which more and more people are talking about as coming forward, they would be covered."<sup>176</sup>

The E-commerce Directive sets out principles. It does not go into great detail as to how you actually set those principles into practice. But rather encourages, what we call, flexible systems that the Member States will have to look at, as and when the text is transposed. And there is a clear call for self-regulatory systems, but involving consumer bodies. And, above all, alternative dispute regulation systems that will bring consumer trust into this market, which is absolutely essential. The Information Society Service will be considered to be at a stage where its economic centre is organized, where the manpower that updates a Web site, where that company's based. It is not where the server is. The server could be shifted in the next hour, or switched in the next hour. If you want a parallel, it's very much like the difference between an establishment of a television company and an up link. Although a server is even more easily transferred to than an up link? So, it's where the economic entity is.<sup>177</sup>

### **2.3.1 E-HEALTH COMPARISON BETWEEN TRADITIONAL AND ONLINE INFORMATION SOCIETY SERVICES**

The Information Society offers new possibilities for improving almost every aspect of healthcare, from making medical systems more powerful to providing better health information to everyone. Recognising that European citizens are avid consumers of health related information on the internet and recognising that they are already using the types of rating system described above, the European Council at Feira<sup>178</sup>, supported an initiative within e-Europe 2002 to develop a core set of Quality Criteria for Health Related Websites.

Health related web sites are now amongst the most frequently accessed sites on the internet with current estimates indicating that there are now over 100,000 sites offering health related information

---

<sup>176</sup> Jean Bergevin DGXV, Internal Market and Financial Services The European Commission

<sup>177</sup> Advertising Information Group Edited Proceedings of: European Commercial Communications Forum III 13th July 1999 The European Parliament Brussels pp20

<sup>178</sup> June 19-20- 2000



As a result of the wealth of information available and its apparent popularity, a number of organisations have begun to provide specific tools for searching, rating, and grading this information, while others have set up codes of conduct by which site providers can attest to their high quality services. The aim of such tools is to assist individuals to sift through the mountains of information available so as to be better able to discern valid and reliable messages from those, which are misleading or inaccurate.<sup>179</sup>

In order to understand the impact of an online medium, in contrast with a traditional visit to the doctor or GP. I will use the following Slovenian example to clarify this point: “Some years ago, commercial broadcasting company POP TV introduced a weekly show on health into its regular TV news. The show provided short information on various illnesses, on novelties in healthcare system, on new medicines, etc. The response of the viewers was very positive and they could also obtain additional information related to health and disease from the website of the broadcasting company. Recently, POP TV launched an Internet website related to health advice (POP’s doctors) that enables contacts with doctors from different disciplines by email. The visitors can ask for advice and consultancy regarding health problems and get answers by e-mail free of charge. The service provides for anonymity. At present, over 30 doctors provide consultancy and advice. The interest for the service was very strong immediately after its introduction (in fact, some doctors were filled up with emails) and additional doctors had to be included into the team. These case points to the fact that Information Society Services enabled by the Internet bring advantages to all parties involved. Media gets popularity and eventually wider audience, doctor’s additional patients and users of POP’s doctor’s services get easy and free access to health advice. By enabling the access to the archive of questions and answers to all visitors of website the spill-over effects are even broader. On the other hand, the perception of users of services that the website provides easy way of communication with doctors shows high extent of user friendliness of such services. This fact is very important for the attractiveness of Information Society Services among general population. In addition, such services are of largest importance for senior people who are not intensive users of Internet. Thus, interesting contents could also increase the familiarity of senior population with the new media or at least dismantle negative perceptions”.<sup>180</sup> Even when we can replace the information

---

<sup>179</sup> Eysenbach G, Sa ER, Diepgen TL. Cybermedicine. Interview by Clare Thompson. BMJ 1999 Nov pp 1294

<sup>180</sup> WORKING PAPERS NR. 26. FACTORS AND IMPACTS IN THE INFORMATION SOCIETY A PROSPECTIVE ANALYSIS IN THE CANDIDATE COUNTRIES REPORT ON SLOVENIA INSTITUTE OF MACROECONOMIC ANALYSIS AND DEVELOPMENT LJUBLJANA, SLOVENIA January 2004  
[http://24ur.com/zdravniki/index.php?section\\_id=140](http://24ur.com/zdravniki/index.php?section_id=140)



given by the GP or doctor, there are certain aspects that are still far from being able to do over the Internet when a patient is facing a medical emergency. Together with the inevitable risk that e-health can also bring to having our privacy life expose, in an eventual attack of hacking or similar threats.

The, E-health system fall under article 8<sup>181</sup>, which established regulated professions are encouraged to draw up a Good Practice Guide at Community level for the marketing of professional services to determine the information that can be used in commercial communication (Art. 8.2). Member States are given the responsibility to supervise that regulated profession follow professional rules when they offer Information Society Services (Art. 8.1) In the internal markets sets the minimum for the information the service provider has to offer to the service receiver about him/herself (Article 5): name, geographical address of establishment, other contact information, the registrative body, supervising authority, possible identification number for value added tax. In addition, regulated professions, such as doctors, also have to indicate their professional title and the body and the member state which registered their authority. Access to Professional rules in that state must be displayed. Member states are required to establish means for supervision of the implementation of the Directive and shall co-operate with other member states when necessary. EU has taken measures to promote safer use of the Internet.<sup>182</sup> Adopted a multi-annual community action plan on promoting safer use of Internet by combating illegal and harmful content on global networks. It is based much on non-legislative measures to regulate Internet.

Together with the rationale for the use of the country of origin principle is that it makes commercial life much easier and certain for service providers, since they only need to comply with laws in their place of commercial establishment and was deployed in order to encourage the growth of e-commerce service provision, since use of the country of destination principle could act, arguably, as a disincentive to entry into E-commerce service provision. In the case of regulated professions, the use of commercial communications, which are part of an Information Society Services provided by member of regulated profession, is permitted subject to compliance with professional rules

Moreover, activities, which by their nature cannot be carried out at a distance and by electronic means, such as medical services requiring a physical examination, are not Information Society Services. In the case of profession such as doctors have developed guidelines on e-medicine or e-

---

<sup>181</sup> E-commerce Directive 2000/31/EC

<sup>182</sup> Decision no 276/1999/EC





health, a system of e-correspondence between doctors and their patients and on marketing of health services over the net. “Interactive **e-health** services, such as online medical prescription services, are already available in some Member States”<sup>183</sup>.

E-health is the process of providing health care via electronic means, in particular over the Internet. It can include teaching, monitoring (e.g. physiologic data), and interaction with health care providers, as well as interaction with other patients afflicted with the same conditions. About a year ago IBM coined the term "e-care" to describe electronic interaction between patients and their health care providers, and recently a new term, "e-monitoring"<sup>184</sup>, has originated to describe electronic monitoring of patient physiologic data at home

The Commissioners Markos Kyprianou, (Health and Consumer Protection) and Viviane Reding (Information Society and Media), are calling on governments and the private sector to make better use of information and communication technologies (ICT) in Europe’s healthcare systems. Health ministers and IT experts from across Europe are due to meet in the Norwegian town of Tromsø on 23 and 24 May to debate how the potential of “e-Health” can be realized. The Commission, Luxembourg Presidency and the Norwegian government jointly organize this third European ministerial conference on e-Health. The event also encompasses an exhibition of best practices in healthcare drawn from across Europe. E-health can really help empower patients. Europeans increasingly want to play an active role in decisions relating to their health. E-Health can give them the easy access to high quality health information that they need to achieve this. As part of its current e-Health action plan, the Commission will launch a EU Health Portal later this year, providing a “one stop shop” for health information produced by the EU and a gateway to the websites of national and regional health authorities and civil society groups in the health field.<sup>185</sup>

---

<sup>183</sup> <http://register.consilium.eu.int/pdf/en/02/st15/15220en2.pdf>

<sup>184</sup> E-monitoring utilizes home monitoring devices, such as a typical home blood pressure monitor, that are connected to the Internet and allow management of patients remotely. For example, a patient takes their blood pressure at home in the conventional manner, but with e-monitoring, the data is also automatically transmitted via the Internet to either their provider or to a monitoring center. We will soon also be able to utilize audio and even video in our communications with patients via the Internet, and this will greatly enhance monitoring/management capabilities.

<sup>185</sup> IP/05/583 Brussels, 20 May 2005 e-Health: Commission calls for better use of technologies that empower patients, improve healthcare and save lives

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/583&format=HTML&aged=0&language=en&guiLanguage=en>



The impact of “e-Health” is, therefore, as diverse as the sector itself, encompassing the quality of health-related Web content, patient data security, telemedicine<sup>186</sup> technologies, tackling administrative headaches for hospital staff, doctors and patients, and much more. On the one hand, it aims at fundamentally restructuring the way in which health services are provided to individuals. On the other hand, it involves particular legal challenges, as it deals with a special category of “sensitive” personal data that are subject to a strict legal regime. Pursuant to Article 8(1) of Directive 95/46/EC, the processing of personal data concerning, among others, health, is in principle prohibited. Paragraph (2) of this article provides for several exceptions from this prohibition. Thus, health-related personal data may be processed where the data subject has given his explicit consent,<sup>187</sup> where necessary in the field of employment law, where processing is necessary to protect the vital interests of the data subject or another person and the data subject is physically or legally incapable of giving his consent, or where the data at issue had been manifestly made public or are necessary for the establishment, exercise or defense of legal claims.<sup>188</sup> The processing is also allowed for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, on condition that the data are processed by a health professional subject to the obligation of professional secrecy.

What Is E-health inside the meaning of Information Society Services? Qualification of the e-healthcare service: according to art. 2 (a) of the directive, any service normally provided for remuneration, at a distance, by electronic means and on the individual request of the recipient of the services constitutes an Information Society Services and consequently falls within the scope of the directive. Thus, any healthcare service supplied at a distance against payment by the recipient or through other means (e.g., advertising revenue etc.) is in principle covered by the directive. Setting-up a medical portal, for instance involving the contribution of doctors (e.g., as writers of scientific articles or providers of initial advice at the request of a patient) will qualify as an information society application, subject to the directive’s restrictions.<sup>189</sup>

---

<sup>186</sup> The term telemedicine refers to the practice of medicine over a distance. In telemedicine, interventions, diagnostic and treatment decisions and recommendations are based on data, documents and other information transmitted through telecommunication systems.

<sup>187</sup> Except where the laws of the Member State provide that the prohibition may not be lifted by the data subject's consent.

<sup>188</sup> Directive 95/46/EC, Article 8(2)(a) – (e)

<sup>189</sup> Skouma Georgia, Van Eecke Patrick, , Health Telematics: Towards harmonisation of the legal framework? lawyers, Bogaert and Vandemeulebroeke, Belgium  
[http://www.landwell.be/Website/Website.nsf/FileAttachments/Health+telematics/\\$FILE/healthtele.pdf](http://www.landwell.be/Website/Website.nsf/FileAttachments/Health+telematics/$FILE/healthtele.pdf).



E-health deals with the use of Information and Communication Technologies (ICT) to develop an intelligent environment that enables ubiquitous management of citizens health status, assists health professionals in coping with some major challenges or integrates the advances in health knowledge into clinical practice.

The "e" stands for electronic which is placed in front of the word health; it implies all things transmitted and technological in health care, which help improve the flow of information and the process of health care delivery.

E-health--any electronic exchange of healthcare data or information across organizations--reflects an industry in transition. Even as its form and structure continue to emerge, e-health is being used to change business and medical practices, affecting every facet of the EU health experience. Business, medical, social, and technological factors are converging to make wide-scale, continuum-based care functionally achievable perhaps for the first time. The Internet clearly drives the development and adoption of e-health applications; standing alone, it has the reach, the infrastructure, and the acceptance to achieve widespread change.

E-health is connectivity; it is transactional; it is clinical. It is informational, interactive and interventional. The biggest challenge of e-health is to codify health information about disease and patient care into databases that can be manipulated for the benefit of the patient individually and society collectively. The information must be delivered "just in time" to benefit the patient and support the physician in the delivery of the care. How to utilize this new knowledgebase to improve care for everyone and weave its cost into the economy is as important as the next bigger (or smaller), faster widget. Rules and laws that are flexible to accommodate this new technology and protect the public must evolve.

E-Health services, like all medical services in a modern society, are provided and received within a broader scheme of public health care and social security. This means that there needs to be an interface between the e-Health portal and the authority or entity dealing with social security issues (health and hospital insurance etc.). It seems most unlikely that a scheme would be feasible in which a patient remains entirely anonymous both to the GP and to the social security entity refinancing the treatment. Perhaps another "trusted third party" scheme could be a solution. The scenario envisages the setting up of a health portal where users can obtain medical advice free of charge and anonymously. It should be kept in mind that in some Member States there might be legal



provisions in force that put such a construction into question. For instance, the laws of several Member States reportedly prohibit anonymous provision of telemedical services (doctor-side anonymity): Finland, France, Germany, Greece, Italy and Sweden. Anonymous use of telemedicine (patient anonymity) is not possible in Finland and Italy.

Consequently, anonymity on the part of both providers and users of e-Health services seems excluded as the law now stands in Finland and in Italy, while Belgium, the Netherlands, Portugal, Spain and the United Kingdom allow for both doctors and patients anonymity.<sup>190</sup> Of course, the legal situation may look differently if the services provided could be qualified as psychological assistance or other counseling services rather than “health services” sensu stricto, the provision of which is normally restricted to a doctor/medical professional.

Interactive e-health web applications are websites that provide information and allow the consumer/patient to interact by clicking on buttons, entering data, writing on bulletin boards and so forth. Interactive applications also include disease monitoring and management, or, to use IBM's term, "e-care." For example, a diabetic patient could enter their glucose values on a web page form and send it to their provider. After viewing the data, the provider could then post an assessment, complete with the provider's picture, on the web page with recommendations to the patient to modify or continue the patient's treatment regime. Well, interactive web sites could be used for a whole host of other areas in health care. Interactive web sites can and will revolutionize patient teaching and reinforcement of learning. I see interactive web sites being used in most chronic incurable health conditions such as asthma and COPD, and in chronic curable conditions, such as in the bedwetting example above, where charting treatment progress is an important part of the curative process. I also see interactive web site interaction being used in electronic charting where the patient could add information on their progress in their patient record on an on going basis. Patients are now also demanding that they be able to access their electronic medical records online. Again, I would visualize that abnormal or contraindicated information would cause an alarm or signal to be sent to the provider who then could intervene as needed. Interactive patient monitoring and management data will also feed directly into patient electronic medical records.

---

<sup>190</sup> CPME: Standing Committee of European Doctors 'Guidelines for Telemedicine', October 2002, available at: <http://www.cpme.be>. The document defines “telemedicine” broadly, as “practice of medicine over a distance”, irrespective of the method used (letters, telefaxes, telephones, video conferencing, etc.).



The doctor using e-mail for communication with his/her patients must have time allocated for that purpose and working conditions, which enable effective use of e-mail correspondence. The doctor must define a turnaround time for the e-mail correspondence he/she receives from the patients. The patients and all the relevant health care personnel of the clinic or hospital department concerned must be informed of this turnaround time. A doctor must inform the patients when he/she cannot be reached by e-mail. If arrangements for another doctor or other medical professional to respond to the e-mail are made for this time period, the patient must give his/her consent beforehand. Among the Benefits of usage of e-mail in health care offers a rapid, cheap and versatile means of communication, which is not tied to, a certain place or time. Thus it offers time to patients and health care staff to consider the request or the response. For this reason it is recommended that e-mail correspondence be used instead of instant messaging in health care communication. But the risks of usage of e-mail in health care can be technical, legal and other problems may arise in e-mail. Examples are: interruption of e-mail, lack of integrity, and threat to confidentiality, problems related to cross-border practice of medicine with particular regard to jurisdiction, registration and indemnity<sup>191</sup>.

The legal debate becomes even more complicated when the focus is put on the provision of healthcare services through ICT tools and applications<sup>192</sup>. Given the supra-national nature of the Internet, national legislators have to tackle the legal issues emerging in this area from a global perspective.

Although the basic rule for their guidance should be that regulation on the practice of medicine is relevant also for the practice of telemedicine, certain elements typical to the on-line provision of services are generating new requirements. On the one hand, the de facto elements of the on-line environment that inevitably affect the provision of health services at a distance are:

- 1) Elimination of geographic barriers: demands from patients and supply from healthcare professionals are met across cyberspace (“cyber-medicine”);
- 2) Elimination of physical contact: Individualized interaction in person between physician and patient is being transformed through: a) the intervention of other parties and b) the interference of ICT systems and applications for establishing a virtual doctor-patient relationship;

---

<sup>191</sup> CPME/AD/Brd/160302/7/EN/fr

<sup>192</sup> European Health Telematics Observatory (EHTO), [www.ehto.org](http://www.ehto.org)



3) Elimination of traditional business models: the overall chain of provision of healthcare services, from initializing contact with a physician through performance of the medical service as such (e.g., tele-surgery) to reimbursement of costs (e.g., through electronic prescription) becomes a realistic objective thanks to computerization and networking. On the other hand, the legal requirements regarding the supply of healthcare services at a distance address common legal requirements related to the use of ICT tools in general and specific ones resulting from the application of information technology in an important area of public interest <sup>193</sup>.

The disadvantages to e-health can be briefly described; in first place the health care providers are that e-care and e-monitoring will consume more of their time. They feel that they will have to learn a new technology and that caring for patients this way means that they will have to continuously look at patient data. They also feel that they will lose the patient/health care provider personal relationship if they utilize e-care and e-monitoring and that there will be a lack of certain physical assessment parameters. The patient might also either forget what the doctor told them or is afraid to ask their provider during a rushed office visit. With e-health care both patient and provider communication can potentially improve. E-health care has the potential to actually improve the quality of health care delivery. The problem of inadequate physical assessment will be obviated or greatly reduced when audio and videos are more readily available, which will be shortly.

When it comes the barriers to providing e-monitoring. First, most provider's offices don't have personal computers, or if they do, they aren't hooked up to the Internet; second, the staff does not have a basic knowledge of computer or Internet use and operation; and third, the staff does not know how to interact with patients using Internet communication. Actually, most patients are more adapt at using computers and the Internet than their health care providers. A recent study by Intel revealed that the medical industry is behind even the trucking industry in adoption of information technology. The technology is here, but the health care industry is not utilizing it. The fourth problem is that consumers don't want to or can't afford to pay for e-monitoring, and third party insurance reimbursement will take time to implement and adapt to this new way of health care delivery. I think that once the insurance industry sees the potential cost savings in this area, they will embrace it.

---

<sup>193</sup> A Legal Framework for Security in European Health Care Telematics, Otto Rienhoff, Caroline Laske, Patrick Van Eecke, Paul Wenzlaff, Ursula Piccolo, Volume 74 Technology and Informatics, Press, 2000.



## CHAPTER 3 FINAL REMARKS

The goal of this final section is to emphasise the role of the socio-political and economic development of Europe of the Information Society Services infrastructures. Keeping in mind that WE as a society need to devote more attention to the new technologies and the impact of market convergence and new regulatory development.

### 3.1 WHAT IS AHEAD IN THE ISS FIELD? SOLUTIONS?

As Europe's economy and society becomes more dependant upon electronic communications and upon the Internet, the critical and social processes are becoming more vulnerable to accidental or malicious failures in the information society systems. With the emergence of the Information Society in Europe long time ago, has led to a growing recognition that ensures more trustworthy information.

The key for the future success will be to carry on in the same path and do not loose track of the complexity and problems that come along the way, giving rapid solutions reflect in adjustment of legislation at an international and national level, with a horizontal approach to avoid conflict among member states and other countries that will like to participate or cooperate with the members.

The main critic that I will like to enhance is the use of a collorary definition when it comes to Information Society Services. The main problem here is that the advance of digital technologies have created confusion when it comes to telecommunication, broadcasting and Information Society Services. May be the time has come for the legislators to make the concept more independent, because as recital 22 of the Transparency Directive such ramification can provoke a complicated misunderstanding. The examples used during my thesis helped to illustrate how hard can be to contrast opposite poles such e-health (a normal visit to the doctor and an e-doctor). The conflicts between traditional and online services are not over yet; the possible solutions will be a work in progress. Another alternative will be provided by e-Europe plan 2005 which will bring to the table an improvement in security, which still presents problems, and create a true convergence of platforms.



Finally remove barriers in order to maximize the contribution of all technologies and infrastructures in order to see full development of the market for Information Society Services. There is disagreement among market players concerning the extent to which operators of some networks should be allowed to exercise commercial control over the content. Even when we dream to replace traditional services with online technology we can push the limit until to certain point because there will be always cases that we as individuals will have to go to an emergency appointment to the doctor or identify ourselves to open an account in a bank.

It is difficult to give solutions when new activities emerge every day and the legislation can't keep up with the changes of time. If the Information Society Services are going to be freely moved is not enough with the European Union Legislation having a horizontal approach, so more harmonization is need, because as the Belgian example given in the above pages, barriers of interpretation are still giving problems for national court to analyse the transposition of the E-commerce Directive into national law.

### 3.2 CONCLUSION

First the wording of art 1(1) in the E-commerce Directive is causing troubles when it comes to Internet. I had stated the global nature of the information society. Even when the first attempt of the drafters was to cover all kind of Information Society Services, the attempt was replaced for another system, which is using the Information Society Services that are NOT include in the definition. It seems that is a big failure and brings more controversy, that help to complicate the understanding of the definition of Information Society Services.

The terminology is complex by itself and the use of term such as “**any**” leave the field wide open for many interpretations, in conjunction with article 50 of the EC Treaty, will be advisable to revise this area and to come with possible solutions. I do agree also with Arno Loader that the definition beside from being complex, it is also misleading for all the critics stated during the thesis.

The narrow interpretation of other term such as “**remuneration**” bring issues of what kind of payment are we considering when it comes to an Information Society Services? In here to look more than an economic profit problem or a transfer of virtual money, because what can result of all





the ambiguities is an intentional exclusion of certain Information Society Services. If we don't want to stop the economic growth we have to avoid cases as the Mediakabel.

Similar problems can be address when I identified the “**electronic means**” terminology, because with the advance of new technology and the implementation of digital platform and the convergence of all of them together, can stop, restrict or even caused regrettable troubles that will end up again in leaving outside the scope certain Information Society Services. Specially in such tenuous line comparing telecommunication, broadcasting and Information Society Services

Traditional services are beneficial until certain point, the natural disadvantages of e-health can be briefly described as the caring will not be the same quality in an online medium services, because there will be opportunities that can no longer be handle by electronic means. Creating other kind of problems such as breaking into a data system or a file of a patient, sending virus, or other kinds of intrusions attack that are sensible in areas such as e-health and financial system.

In the case of the financial services another example given in the annex to illustrate the problems are that one of the biggest obstacles facing on-line traders is the lack of confidence that consumers and customers have in the on-line medium. Transactions entered anonymously are also quite difficult in terms of presenting evidence in case of a dispute or breach of contract. The legality and feasibility of a fully anonymous payment system need to be further analyzed.

As a final point the financial regulation at European level should be revisited once the need to address the remaining uncertainties becomes more urgent with the increased use of ecommerce. Harmonization has been achieved on certain aspects, often in close relation with global developments, as was the case in the field of prudential supervision. In other aspect, however, in particular relating to the protection of the consumer, little harmonization has been achieved<sup>194</sup>. The E-commerce Directive demonstrates that there is a considerable need for harmonization in the area of commercial communications, including advertising, marketing and sponsorship that should be subject to certain transparency requirements so as to ensure consumer confidence and fair-trading. There is no easy answer to many questions when they are related to advertising online and offline, and to complicate the aspect even more is the cross border advertising and marketing.

---

<sup>194</sup> Steil, Benn (1998), *Regional Financial Integration: Learning from the European Experience*, Royal Institute of International Affairs, London.



## REFERENCES

1. A guide for business to electronic commerce (SI 2002/2013) 31 July 2002 Information Society Services
2. A Legal Framework for Security in European Health Care Telematics, Otto Rienhoff, Caroline Laske, Patrick Van Eecke, Paul Wenzlaff, Ursula Piccolo, Volume 74 Technology and Informatics, Press, 2000.
3. Advertising Information Group Edited Proceedings of: European Commercial Communications Forum III 13th July 1999 The European Parliament Brussel
4. Alberdingk Thijm, Door Christiaan Wat is VoIP (juridisch gezien)?  
<http://www.advocatie.nl/scripts/solvlog.dws?13>
5. ANNEX H Procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Art. 14) ARTICLE 1 Num.2
6. Belgian Parliament corrects an implementation error over the use of the word "advertising"(Belgian State Gazette, 15 July 2004) Program Law of 9 July 2004
7. Bergevin Jean, DGXV, Internal Market and Financial Services The European Commission
8. BOLAS ALFONSO, J. "Firma electrónica, comercio electrónico y fe pública notarial" Revista Jurídica del Notariado, 2000.
9. Brussels, 18.11.1998 Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on certain legal aspects of electronic commerce in the internal market COM (1998) 586 final; 98/0325 (COD)
10. Bulletin EU 7/8-1996. <http://www.europa.eu.int/abc/doc/off/bull/en/9607/p103159.htm>.
11. Burkert, H., Privacy-Enhancing Technologies: Typology, Critique, Vision, Agre P.E., Rotenberg, M. (eds.) Technology and Privacy: The New Landscape, 2001 (Third Printing), The MIT Press, Cambridge, MA/London,
12. Castells, Manuel "The Information age: Economy, Society and Culture, Vol. 1,2,3, The Network Society, Oxford: Blackwell, 1996.
13. CENTRE FOR EUROPEAN POLICY STUDIES, REGULATING E-COMMERCE IN FINANCIAL SERVICES
14. Chissick and Kelman Electronic Commerce Law and Practice (2000) Sweet & Maxwell.
15. COM (97) 157 final, 16.4.1997
16. COM (99)112 – extract, 30 July 1999 <http://cm.coe.int/reports/cmdocs/1999/99cm112ext.htm>.
17. COM(1998) 586 final Proposal for a EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE on certain legal aspects of electronic commerce in the internal market pp
18. Commission Communication of 7 February 2001 to the Council and the European Parliament on e-commerce and financial services COM(2001) 66  
<http://europa.eu.int/scadplus/leg/en/lvb/l32044.htm>
19. Commission Communication to the Council, the European Parliament and the European Central Bank of 14 May 2003 on the application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive
20. COMMISSION OF THE EUROPEAN COMMUNITIES Brussels, 08.05. 1996 COM (96) 192 final the Internal Market Green paper from the Commission.
21. COMMISSION OF THE EUROPEAN COMMUNITIES Brussels, 3.12.2002 SEC (2002)
22. COMMISSION Report of 13 February 2003 IP/03/227, on the functioning of Directive 98/34 in the field of Information Society services.
23. COMMISSION STAFF WORKING PAPER Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications.
24. Conditional Access Directive Explanatory Memorandum-Provisional



25. COUNCIL OF THE EUROPEAN UNION Brussels, 13 January 2003 (13.01) 5191/03 AUDIO 1 COVER NOTE from : Secretary-General of the European Commission, signed by Mr Sylvain BISARRE, Director date of receipt : 8 January 2003 to : Mr Javier SOLANA, Secretary-General/High Representative Subject: Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers" Delegations will find attached Commission document COM(2002) 778 final.
26. Council Presidency conclusions at: <http://ue.eu.int/en/Info/eurocouncil/index.htm>
27. Court d'Appel, March 31, 2000. SA coopérative compagnie financière du credit mutuel de Bretagne v. Association Federation d'Ille et Vilains
28. Cox Trevor, Chaos versus uniformity: the divergent views of software in the International Community <http://www.trevorcox.com/downloads/chaos-vs-uniformity.doc>.
29. CPME: Standing Committee of European Doctors 'Guidelines for Telemedicine', October 2002, available at: <http://www.cpme.be>. CPME/AD/Brd/160302/7/EN/fr
30. D. Johnson and D. Post, "Law and Borders: The Rise of Law in Cyberspace", pp 1371-1372, 48 [1996] Stanford Law Review 1367-1402.
31. D. Rice, Exploring Legal Boundaries in Cyber securities: What Law Controls in the Issuance and Trading of Securities on the Internet?, Edition 6th Interim Report for the International Law Association, London, July 2000; American Bar Association, "Achieving Legal and Business Order in Cyberspace, A Report on Global Jurisdiction Issues Created by the Internet", 2000 Business Lawyer 1806-1946.
32. Dasse Marc, Financial services in the e-commerce age :Towards a regulatory shamble? Publié par Editions de l'Université Libre de Bruxelles,,2003, tome II
33. DigiTAG response to Commission Staff Working Document on Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications, page 2, 14/02/2003
34. 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) Official Journal L 178, 17/07/2000 P. 0001 - 0016
35. Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, Official Journal L 192, 24/07/1990
36. Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ L 202, 30.7.1997, p. 60.
37. 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, as amended by Directive 98/48/EC of 20 July 1998); (OJ L 204, 21.07.1998, and OJ L 217, 5.8.1998)
38. Directive 98/84/EC of 20 November 1998 on the Legal Protection of Services Based on, or Consisting of, Conditional Access 1998 O.J. (L 320) 54
39. Directive on Electronic Commerce 2000/31/EC Official Journal L 178 , 17/07/2000
40. Directives 95/46/EC and 97/66 /EC (OJ L 281, 23.11.1995 and OJ L 24, 30.01.1998)
41. Does the Existing Regulatory Framework for Television Apply to the New Media? LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY, Ed. IRIS plus, Issue 2001-6
42. Draft Convention is contained in the request for an opinion from the Committee of Ministers, Parliamentary Assembly Doc. 8982 of 22 February 2001, available at: <http://stars.coe.fr/doc/doc01/EDOC8982.HTM>



43. DTI Consultation on the Electronic Commerce (EC Directive) Regulations 2002 DIGITAL CONTENT FORUM POSITION PAPER  
[http://www.dti.gov.uk/industry\\_files/pdf/ecommerce/DigitalContentForum\(2\).pdf](http://www.dti.gov.uk/industry_files/pdf/ecommerce/DigitalContentForum(2).pdf)
44. E. Katz and T. Claypoole, "Willie Sutton Is on the Internet: Bank Security in a Shared Risk Environment", pp 191-192, 5 [2001] North Carolina Banking Institute 167-231.
45. E. Stevens, *The Internet as a Financial Services Distribution Channel*, Lafferty Publications, Dublin, 1997.
46. E-BUSINESS IN THE UNITED KINGDOM THE BASIC LEGAL FRAMEWORK ALAN HAWLEY SOLICITOR MEDIA & TECHNOLOGY GROUP RICHARDS BUTLER October 2004
47. E-Directives: Guide to European Union Law on E-Commerce Commentary on the Directives on Distance Selling, Electronic Signatures, Electronic Commerce, Copyright in the Information Society, and Data Protection Edited by Arno R. Lodder Henrik W. K. Kaspersen ED. 2002 KLUWER LAW INTERNATIONAL THE HAGUE / LONDON / NEW YORK.
48. EGTA's reply to the European Commission's public consultation on the Review of Directive 89/552/EEC as amended by Directive 97/36/EC, July
49. ETNO Reflection Document on the revision of the Television without Frontiers Directive June2005...[http://www.etno.be/upload/down\\_files/9336/RD217%20-%20EIS-ACON%20TVWF%20Directive%20revision%20-%20first%20input.doc](http://www.etno.be/upload/down_files/9336/RD217%20-%20EIS-ACON%20TVWF%20Directive%20revision%20-%20first%20input.doc).
50. Europe's Way to the Information Society: An Action Plan From the Commission to the European Council, COM (94)347 final; the Bangemann Report on "Europe and the Global Information Society—Recommendations to the European Council," at <http://www.bookmarks.de/lib/politics/bangemann>; Copyright and Related Rights in the Information Society of 19 July 1995, COM(95)382 final
51. European Health Telematics Observatory (EHTO), [www.ehto.org](http://www.ehto.org)
52. Explanatory Memorandum to Communication from the Commission to the European Parliament, the Council, and the Economic and Social Committee: Proposal for a European Parliament and Council Directive on the Legal Protection of Services Based on, or Consisting of, Conditional Access, (Provisional Version July 9, 1997),  
<http://europa.eu.int/-ISPO/-legal/-en/-converge/-condaccess.pdf>
53. Explanatory Memorandum to Proposal for a European Parliament and Council Directive on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society of 10 December 1997, COM(97)628 final at 2
54. Eysenbach G, Sa ER, Diepgen TL. Cyber medicine. Interview by Clare Thompson. *BMJ* 1999 Nov pp 1294
55. Fejø, Jens, Nielsen Ruth og Rus Thomas; Legal Aspects of Electronic Commerce. Article : "Directive on Electronic Commerce (2000/31/ec)" By Pia Lindholm and Frithjof A. Maennel
56. Financial Services and Markets Act, 2000, c. 8, § 19 (Eng.) (requiring firms to obtain authorization to carry on regulated financial activities in the UK),  
<http://www.hmso.gov.uk/acts/acts2000/20000008.htm>
57. Green Paper on the Legal Protection for Encrypted Services in the Internal Market, Consultation on the Need for Community Action, COM(96)76, at 23-31 [hereinafter Encrypted Services Green Paper], available at <http://europa.eu.int/en/record/green/gp004en.pdf>.
58. Hacking Bsky B: The legal protection of conditional access services under European law Published in *Entertainment Law Review*, 1999-5,  
<http://www.ivir.nl/publications/helberger/HackingBskyB.html> H
59. Harms John Toward A Critical Theory of Advertising University of Texas at Austin
60. Hilton, A. (2000), "Internet banking: A fragile flower", CSFI, London, March.
61. Information Society Services, Parliamentary Assembly Doc. 8982,
62. Information Society Technologies (IST) Programme ATHENA "Digital Switchover: Developing Infrastructures for Broadband Access" Contract No FP6-507312



63. Institute for Information Law, Protection of technological measures, Imprimatur Study, Amsterdam, November 1998
64. International Communications Round Table Initial Comments on the Proposed Electronic Commerce Directive 11 March 1999 [http://www.icrt.org/pos\\_papers/1999/990311\\_EC\\_Gen.pdf](http://www.icrt.org/pos_papers/1999/990311_EC_Gen.pdf)
65. International Monetary Fund, A. Belaisch et al, Euro-Area Banking at the Crossroads, Working Paper 28, Washington DC, 2001; Bank for International Settlements, W. White, The Coming Transformation of Continental European Banking, Working Paper 54, June
66. IP/00/442 Brussels, 4 May 2000 Electronic commerce: Commission welcomes final adoption of legal framework Directive [http://www.tax-news.com/asp/res/EU\\_ecom\\_dir\\_5\\_00.htm](http://www.tax-news.com/asp/res/EU_ecom_dir_5_00.htm)
67. IP/03/1580 Brussels, 21st November 2003 e-commerce: EU law boosting emerging sector pp2
68. IP/05/583 Brussels, 20 May 2005 e-Health: Commission calls for better use of technologies that empower patients, improve healthcare and save lives  
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/583&format=HTML&aged=0&language=en&guiLanguage=en>
69. K. Frust "Who Offers Internet Banking", p. 30, Special Studies on Technology and Banking, 19 [2000] Quarterly Journal 29-48, US Comptroller of the Currency, Washington DC.
70. Koenig Michael, Die Qualifizierung von Computerprogrammen als Sachen im Sinne des Sec. 90 BGB Neue Juristische Wochenschrift, 2604, 2605 (1989).
71. Läärä,, Case C-124/97 para 15-18.
72. Le changement d'environnement pourrait constituer la limite du champ d'application de la Directive TSF qui, en principe, cesse de s'appliquer dès que le téléspectateur fait le choix (individuel) de sortir de l'environnement linéaire. ", Bird & Bird / Carat Crystal Study, p.95
73. Lodder Arno R., Henrik W. K. Kaspersen e-Directives: Guide to European Union Law on E-Commerce Commentary on the Directives on Distance Selling, Electronic Signatures, Electronic Commerce, Copyright in the Information Society, and Data Protection Edited . 2002 KLUWER LAW INTERNATIONAL THE HAGUE / LONDON / NEW YORK pp71-72
74. Lubbock Ms ,Krosch ; E-commerce doing Business electronically London Ed 2000 pp 21
75. Lucas Bergkamp and Serge Clerckx Volume 5 Number 47 Page 1210 Wednesday, December 13, 2000 Electronic Contracting in Europe
76. Martínez López, Mari Carmen University of Stockholm, Faculty of Law Master's Programme in Law and Information Technology 2001/2002 Electronic contracts within the European Union
77. McGonagle: Tarlach Does the Existing Regulatory Framework for Television Apply to the New Media IRIS Plus (Supplement to IRIS - Legal Observations of the European Audiovisual Observatory 2001-6.
78. Milano, Giuffrè "Teoría Jurídica del Documento"
79. Mueller, Milton (2002), Ruling the Root – Internet Governance and the Taming of Cyberspace, Cambridge: MIT Press.
80. OECD E-commerce: Impacts and policy challenges, Working Paper 252, Paris.
81. OJ L178, 17.07.2000, p.1.
82. Open platforms in digital television and 3G: Commission assesses state of play and charts way forward IP/03/978 Brussels, 9 July 2003  
[http://www.fub.it/dvb/dvbt/PDF\\_files/openplatforms.pdf](http://www.fub.it/dvb/dvbt/PDF_files/openplatforms.pdf)
83. Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: "A European initiative in electronic commerce", OJ C 19, 21.1.1998, p. 72.
84. Opinion of the Economic and Social Committee on the "Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market,' 3.6, 3.6.2, 1999 O.J. (C 169)



85. Pearce Graham, REGULATING ELECTRONIC COMMERCE IN THE EUROPEAN UNION, Aston Business School, Aston University, Birmingham, January 2001 ISBN No: 1 85449 501 1 pp7
86. Price Waterhouse Coopers, Protect and Survive- Regulation of Electronic Commerce in the Financial Services Industry, pp 19-29, Report, London, July 2000.
87. Prins, J.E.J., de Vries, M., ID or not to be? Naar een doordacht stelsel voor digitale identificatie, Rathenau Institute, The Hague, Werk document 91, April 2003
88. Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations and providing for regulatory transparency in the internal market for information-society services (amended Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (OJEE L 109, 26.04.1983), as last amended by Directive 94/10/EC (OJEE L 100, 19.4.1994)), Bulletin EU 7/8-1996.
89. Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, Explanatory Memorandum, art. 3, 1999 O.J. (C 30) 4
90. Recommendation No. R (91) 14 of the Committee of Ministers to Member States on the Legal Protection of Encrypted Television Services, available at <http://www.coe.fr/cm/ta/rec/1991/91r14.htm> [hereinafter Recommendation No. R (91) 14].
91. Reed Chris, MANAGING REGULATORY JURISDICTION: CROSS-BORDER ONLINE FINANCIAL SERVICES AND THE EUROPEAN UNION SINGLE MARKET FOR INFORMATION SOCIETY SERVICES Houston Law Review, 38 Hous. L. Rev. pp1003
92. Rennie Michèle Computer and Telecommunications Law Review 1999 Issue 8 E.U. Electronic Commerce Directive: August '99 amendments still avoid Consumer Internet Protection. M-T.
93. Report from the Commission to the European Parliament and the Council. Evaluation of the Application of Directive 98/34/EC in the Field of Information Society Services, Brussels, Com (2003) 69 final, February.
94. REPORT OF A JOINT CEPS/ECRI WORKING DIEZ GUARDIA NURIA
95. REPORT ON E-COMMERCE AND FINANCIAL SERVICES TO THE FINANCIAL SERVICES POLICY GROUP ANNEX III: POINTS OF CLARIFICATION pp12
96. Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on "A European initiative in electronic commerce" A4-0173/98.
97. Roger Brownsword and Geraint Howells, CONSUMER PROTECTION ON THE INTERNET: THE IMPACT OF THE INFORMATION SOCIETY ON LAW Draft of paper prepared by Institute for Commercial Law Studies, University of Sheffield for a special issue of the journal Contemporary Issues in Law <http://jsis.artsci.washington.edu/programs/europe/Netconference/HowellsPaper.htm>
98. Rowe, H. (1999) E-commerce policy developments in the UK and the EU, Computers and Law, 10, 2, 21-26.
99. SERRA DOMINGUEZ "Prueba documental", Enciclopedia Jurídica Seix.
100. Skouma Georgia, Van Eecke Patrick, , Health Telematics: Towards harmonisation of the legal framework? lawyers, Bogaert and Vandemeulebroeke, Belgium
101. Smith Graham Book Marketing on the Internet
102. Smith Graham, in Internet Law and Regulation, Sweet & Maxwell, London, 2002, at p 268. See pp 268-269 for a discussion on the various possibilities for confusion.
103. SPEECH/04/518 Viviane Reding Member of the European Commission responsible for Information Society and Media Business without frontiers: Europe's new broadcasting landscape European Media Leaders Summit 2004 London, 7 December 2004



104. Steil, Benn (1998), Regional Financial Integration: Learning from the European Experience, Royal Institute of International Affairs, London.
105. The European Union Takes Initiative in the Field of E-Commerce Julia Hörnle Research Assistant in E-commerce Law IT Law Unit, CCLS  
[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000\\_3/hornle/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/hornle/)
106. Treaty Establishing the European Community, Mar. 25, 1957, (as amended by subsequent treaties), [http://www.europa.eu.int/-eur-lex/-en/-treaties/dat/-ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/-eur-lex/-en/-treaties/dat/-ec_cons_treaty_en.pdf)
107. UNITED NATIONS Distr. GENERAL TD/B/COM.3/EM.8/2 4 May 1999 TRADE AND DEVELOPMENT BOARD Commission on Enterprise, Business Facilitation and Development Expert Meeting on Capacity Building in the Area of Electronic Commerce: Legal and Regulatory Dimensions Geneva, 14 July 1999 Item 3 of the provisional agenda LEGAL DIMENSIONS OF ELECTRONIC COMMERCE Report by the UNCTAD Secretariat
108. Wenningen, J. (2000), "The Emerging Role of Banks in E-commerce", Current Issues in Economics and Finance, Vol. 6, No. 3, Federal Reserve Bank of New York.
109. WIPO/OLOA/EC/PRIMER DATE:May 2000 PRIMER ON ELECTRONIC COMMERCE AND INTELLECTUAL PROPERTY ISSUES <http://www.marly.de/material/docs/primer.doc>.
110. Worth Charles Andrew Developments in E-commerce Law - JISC Legal - Briefing Paper
111. WORKING PAPERS NR. 26. FACTORS AND IMPACTS IN THE INFORMATION SOCIETY A PROSPECTIVE ANALYSIS IN THE CANDIDATE COUNTRIES REPORT ON SLOVENIA INSTITUTE OF MACROECONOMIC ANALYSIS AND DEVELOPMENT LJUBLJANA, SLOVENIA January 2004
112. WP 14.0 Editors: Simone Fischer-Hübner (Karlstad University), Christer Andersson (Karlstad University) Reviewers: Gerard Lacoste (Compagnie IBM France) Peter Keller (Swisscom AG) Contract N° 507591 - 2004 by the PRIME consortium The PRIME project receives research funding from the Community's Sixth Framework Programme and the Swiss Federal Office for Education and Science.

#### LIST OF JUDGEMENTS/DECISIONS

1. Case 263/86 Belgian State v Humbel [1988] ECR 5365,
2. Case 279/80 Webb European Court reports 1981
3. Case 352/85 Bond van Adverteerders v Netherlands State European Court reports 1988
4. Case C-109/92 Wirth [1993] European Court reports 1993
5. Case C-186/87 Cowan v Trésor public [1989] ECR 195
6. Case C-194/94, CIA Security International S.A.v. Signalson
7. Case C-20/92 Hubbard [1993] European Court reports 1993
8. Case C-322/01, REFERENCE to the Court under Article 234 EC by the Landgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court between Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, JUDGMENT OF THE COURT 11 December 2003
9. Case C-326/88, GB-INNO, 1990 ECR I-667.
10. Case C-76/90 Saeger v Dennemeyer [1991] ECR I-4221.
11. Case Mediakabel BV / Commissariaat voor de Media case n° C-89/04 On 2 June 2005, the European Court of Justice has, in a case taken by the Dutch company Mediakabel against the Commissariaat voor de Media (Dutch Media Regulatory Authority), rendered a decision with implications as to the scope of the Television without Frontiers Directive 89/552/EEC (as amended by Directive 97/36/EC).
12. Cases 263/85, [1988] ECR 5365, 352/85 [1988] ECR 2085.
13. Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377).
14. Case S.A., Jur. H.v J., 1996 ECR I-2201



## INTERNATE WEBPAGES

1. <http://register.consilium.eu.int/pdf/en/02/st15/15220en2.pdf>
2. [http://www.twobirds.com/english/publications/articles/Online\\_Advertising.cfm](http://www.twobirds.com/english/publications/articles/Online_Advertising.cfm)
3. [http://24ur.com/zdravniki/index.php?section\\_id=140](http://24ur.com/zdravniki/index.php?section_id=140)
4. [http://aei.pitt.edu/archive/00001181/01/commercial\\_communication\\_gp\\_COM\\_96\\_192.pdf](http://aei.pitt.edu/archive/00001181/01/commercial_communication_gp_COM_96_192.pdf)
5. <http://conventions.coe.int/Treaty/EN/Reports/Html/178.htm>
6. [http://cwx.prenhall.com/bookbind/pubbooks/bainbridge\\_ema/chapter1/custom7/deluxe-content.html](http://cwx.prenhall.com/bookbind/pubbooks/bainbridge_ema/chapter1/custom7/deluxe-content.html)
7. <http://europa.eu.int/comm/enterprise/tris/>
8. <http://europa.eu.int/comm/eurostat/Public/datashop/print-product/EN?catalogue=Eurostat&product=1-ir031-EN&mode=download>
9. [http://europa.eu.int/comm/internal\\_market/en/ecommerce/999.htm](http://europa.eu.int/comm/internal_market/en/ecommerce/999.htm)
10. [http://europa.eu.int/comm/justice\\_home/fsj/privacy/](http://europa.eu.int/comm/justice_home/fsj/privacy/)
11. <http://europa.eu.int/scadplus/leg/en/lvb/121003.htm>
12. <http://insight.zdnet.co.uk/internet/ecommerce/0,39020454,2108404,00.htm>
13. [http://portal.etsi.org/public-interest/Documents/Directives/Standardization/Directive\\_98\\_34amended.doc](http://portal.etsi.org/public-interest/Documents/Directives/Standardization/Directive_98_34amended.doc)
14. <http://secretariat.efta.int/EFTASec/Web/EFTAConvention/EFTAConventionTexts/AnnexHTBT.pdf>
15. [http://vlf.juridicum.su.se/vlf/theses/Mari\\_Carmen\\_Martinez\\_B.PDF](http://vlf.juridicum.su.se/vlf/theses/Mari_Carmen_Martinez_B.PDF)
16. [http://www.cr-international.com/docs/2003\\_ej\\_deutscher\\_apothekerverband\\_11\\_12\\_2003.htm](http://www.cr-international.com/docs/2003_ej_deutscher_apothekerverband_11_12_2003.htm)
17. [http://www.ebu.ch/CMSimages/en/leg\\_convergence\\_tcm6-4454.pdf](http://www.ebu.ch/CMSimages/en/leg_convergence_tcm6-4454.pdf)
18. [http://www.epp-ed.org/Policies/pkeynotes/33digital-economy\\_en.asp](http://www.epp-ed.org/Policies/pkeynotes/33digital-economy_en.asp)
19. <http://www.europa.eu.int/abc/doc/off/bull/en/9607/p103159.htm>
20. [http://www.firstmonday.org/issues/issue10\\_7/bach/](http://www.firstmonday.org/issues/issue10_7/bach/)
21. <http://www.hmso.gov.uk/acts/acts2000/20000008.htm>
22. <http://www.ist-athena.org/Deliverables/ATHENA%20Deliverable%20D1.1.pdf>
23. [http://www.landwell.be/Website/Website.nsf/FileAttachments/Health+telematics/\\$FILE/healthtele.pdf](http://www.landwell.be/Website/Website.nsf/FileAttachments/Health+telematics/$FILE/healthtele.pdf)
24. <http://www.patent.gov.uk/about/consultations/eccopyright/annexc.htm>
25. <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxxviii/6317.htm>
26. <http://www.ist-athena.org/Deliverables/ATHENA%20Deliverable%20D1.1.pdf>
27. <http://www.twobirds.com/english/publications/articles/BookMktgontheInternet.cfm?RenderForPrint=1>
28. [http://www1.sgae.es/ua/Novedades/2004/Diciembre/UECOMRedingSPEECH-04-518\\_EN.pdf](http://www1.sgae.es/ua/Novedades/2004/Diciembre/UECOMRedingSPEECH-04-518_EN.pdf)
29. [http://europa.eu.int/comm/dgs/information\\_society/index\\_en.htm](http://europa.eu.int/comm/dgs/information_society/index_en.htm)
30. [www.euractiv.com/Article?tcmuri=tcm:29-114578-16&type=News](http://www.euractiv.com/Article?tcmuri=tcm:29-114578-16&type=News)





## **ANNEX EXAMPLES FOR POINT 2.3 COMPARISON BETWEEN TRADITIONAL AND ONLINE INFORMATION SOCIETY SERVICES**

### **(1) FINANCIAL SERVICES AND THE IMPACT IN INFORMATION SOCIETY SERVICE BY THE E-COMMERCE DIRECTIVE**

The E-commerce Directive is designed to enhance the functioning of the EC internal market by removing specific legal barriers to the free movement of Information Society Services between member states, and by improving the level of legal certainty surrounding the provision of such services. It seeks to achieve this by creating a “country of origin” framework for the regulation of Information Society Services.

The E-commerce Directive is a horizontal framework directive that applies to all Information Society Services (“on-line” services) and therefore also to financial services provided on-line. Financial services provided off-line will be subject to a different legal regime. The communication explains that the e-commerce Directive complements sector-specific financial services legislation (information requirements for customers in the field of consumer credit, insurance and distance marketing). For example, the “internal market clause” applies to financial services by enabling providers to supply services throughout the Union on the basis of the legislation prevailing in the Member State in which they are established (i.e. country of origin). The e-commerce Directive also complements the electronic signatures Directive in that it obliges Member States to ensure that their legal system allows contracts to be concluded by electronic means. Financial service providers are unable to comply with fifteen different sets of rules and regulations if they really wish to offer cross-border on-line services. It is also necessary to reassure consumers who are still reluctant to use this type of service. In order to attain this objective, cooperation between the Member States must also be strengthened.<sup>195</sup>

The Directive aims to remove potential restrictions on e-commerce throughout the European Economic Area (EEA) and the European Union (EU) by applying the “country of origin” principle. In relation to financial services, it attempts to remove restrictions on the cross-border provision of financial services by electronic means. The country of origin principle means that, generally, in respect of “Information Society Services” which for these purposes essentially means e-mail, mobile, interactive TV or web-based services, provided across borders within the EEA, the laws of the Member State in which the provider is established will apply. Except in certain circumstances, the provider need only comply with the local laws of its country of origin, irrespective of the Member State in which its services will be consumed. Effectively, this requires Member States to lift any domestic restrictions applied in respect of any incoming providers based elsewhere in the EEA and EU.<sup>196</sup>

The difficulties, if not to say inconsistencies, to which we have just drawn attention come to the fore in a remarkable way in the so called E-commerce Directive, which had to be transposed by Member States before 17 January 2002. It should be recalled that the purpose of the E-commerce directive is to facilitate the provision of services, including most financial services, on a cross border basis by so -called “information society means”. To this end, the E-commerce directive confers on the provider of services delivered by such means a “single passport “. The Member State

---

<sup>195</sup>Commission Communication of 7 February 2001 to the Council and the European Parliament on e-commerce and financial services COM(2001) 66 Not published in the Official Journal <http://europa.eu.int/scadplus/leg/en/lvb/l32044.htm>

<sup>196</sup><http://insight.zdnet.co.uk/internet/ecommerce/0,39020454,2108404,00.htm>



where the provider is established (“the “country of origin”) may regulate, as a rule and within the scope of application of the directive (which excludes among others tax matters), the manner in which these services are provided.<sup>197</sup>

In the case of financial services provided by “information society means” one may, as a result, have to contend with the existence of two “single” passports: The “E-commerce single passport”, issued by the “country of origin”, and the “prudential supervision single passport” issued by the “home country”, that is to say the Member State where the head office of the relevant credit institution is located. One will also have to contend with two different supervisory authorities administering those respective passports: the country of origin supervisor who is responsible for the E-commerce passport, and the home country supervisor, who is responsible for the prudential supervision passport issued under the relevant (banking or investment services) directive. Examples such as a Bank Incorporated in France or a Branch in the Netherlands. Provision of financial services by “information society means”, by the branch in the Netherlands to a client resident in Denmark. The French banking supervisor is responsible for the issue and administration of the “home country control regulatory passport”, including the operations of the Dutch branch of the French bank. However, the Dutch E-commerce supervisor has jurisdiction over the Dutch branch of the French bank with respect to the issue and administration of the E-commerce single passport, issued by the Dutch authorities to said branch.<sup>198</sup>

Technological developments have transformed distribution channels for financial services with the use of ATMs, PIN cards, telephone banking and, more recently, the Internet. In the future, a combination of mobile phones (and also the television) and the Internet might be used for financial services. So far, new channels have generally not replaced old ones, as major financial institutions make a combined use of different channels and users regard new channels as an additional service to traditional distribution channels. Unless customers use the new channel instead of, rather than in addition to, existing ones, online banking represents an added cost rather than savings.<sup>199</sup>

Transactions entered into anonymously are also quite difficult in terms of presenting evidence in case of a dispute or breach of contract. The legality and feasibility of a fully anonymous payment system need to be further analyzed. Banking sector, including electronic banking, is heavily regulated because of its importance for a country's welfare. The state usually imposes controls requiring identification and authentication to ensure that movements of money are legitimate, to combat fraud, counterfeit and money laundering. Most of these issues have been addressed at the EU level.

According to European continental law tradition, a binding legal transaction takes place where there is agreement between two or more parties regarding a number of obligations. The fact that parties come to this agreement without knowing each other's identity does not in principle prevent a transaction from being legally binding. However, anonymous transactions may pose problems with respect to the assessment of the capacity of the contracting parties to enter into a given contract (e.g. age, capacity as a consumer, professional etc.).

---

<sup>197</sup> Dassel Marc Financial services in the e-commerce age :Towards a regulatory shamble? Publié par Editions de l'Université Libre de Bruxelles,,2003, tome II,pp 223 -237

<sup>198</sup> Cf. .supra 192 pp238

<sup>199</sup> CENTRE FOR EUROPEAN POLICY STUDIES, REGULATING E-COMMERCE IN FINANCIAL SERVICES REPORT OF A JOINT CEPS/ECRI WORKING DIEZ GUARDIA NURIA pp8



The new freedoms to provide Information Society Services cross-border are, so far as financial services are concerned, very simple. The provider is obliged only to comply with the licensing and other regulatory requirements of its "home" country, that is, the member state where it has a permanent establishment.<sup>200</sup>

The general principle is set out very clearly in Recital 22 of the Directive: 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.<sup>201</sup>

The impact of the E-commerce Directive in the area of financial services is potentially wide ranging. Many financial services transactions are (and will increasingly be) likely to be conducted by electronic means across borders between member states. The directive will apply in respect of all such services falling within the definition of Information Society Services, contained in article 2(a) of the E-commerce Directive. As that definition is largely concerned with the medium through which services are provided, rather than their subject matter, cross-border financial services of all kinds may fall within the scope of the directive.

By its very nature, a financial service is immaterial. Since no one can come up with concrete evidence of where a financial service is physically delivered (or consumed), both regulators and tax authorities have to answer the question of localization (or consumption) by applying a set of abstract rules. It should be stressed at the outset that the EU localization rules for financial services briefly examined hereafter only apply for financial services provided by a financial services provider which is incorporated in one of the EU Member States and has been granted a so-called "single passport" by the supervisory authorities of said Member State, giving him the right to provide its services throughout the European Union, subject only, as a rule, to the supervision of its "home country" supervisor.

Indeed, these rules have been enacted, pursuant to a number of so-called "financial services directives" for the purpose of facilitating the exercise of the freedom of services granted by the EC Treaty to nationals of the EU Member States, including the legal persons incorporated under the laws of said Member States

Over time, Member States have developed diverging contractual rules for the protection of consumers and investors and they play a significant role in determining the shape of the financial service offered. Services accepted as standard in some Member States (for example, an interest bearing current account) might be illegal in others. Such rules, if not essential for the protection of the general good, inhibit the establishment of an internal market in retail financial services. Until an adequate level of convergence of national rules is achieved, Member States may, in certain areas,

---

<sup>200</sup> <http://www.hmso.gov.uk/acts/acts2000/20000008.htm>

<sup>201</sup> Reed Chris, MANAGING REGULATORY JURISDICTION: CROSS-BORDER ONLINE FINANCIAL SERVICES AND THE EUROPEAN UNION SINGLE MARKET FOR INFORMATION SOCIETY SERVICES *Houston Law Review*, 38 *Hous. L. Rev.* pp1003



need to continue to apply their domestic rules to consumers and retail investors. However, that application would have to be in conformity with the derogations provided in the e-commerce Directive, in particular the derogation under Article 3.<sup>202</sup>

The Commission Communication to the Council, the European Parliament and the European Central Bank of 14 May 2003 on the application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive communication defines three policy areas<sup>203</sup>:

- (1) Ensuring coherence in the legislative framework for financial services by, for example, harmonizing core marketing and information rules and by regulating sectoral issues (banking, insurance, investment, etc.) and product-specific issues (mortgage credit, consumer credit, investment services, UCITS, life and non-life insurance, insurance intermediation, etc.): The Commission will also undertake a review of national rules relating to retail financial service contracts to ensure closer convergence and will inform the Member States on the conditions in which the case-by-case derogation provided for in Article 3(4) may be applied, enabling the Member States to apply on certain conditions, their national provisions to services coming from other Member States, with a view to defending public order or protecting consumers.
- (2) Building consumer confidence in redress and Internet payment systems: For cross-border redress, the Commission supports the establishment of private Alternative Dispute Resolution (ADR) and has launched **FIN-NET** (Financial Services complaints Network) for financial services. For secure Internet payment systems, the Commission intends to develop the **e-Europe** initiative aimed at improving security by new identification and authentication techniques and to encourage the establishment of a legislative framework providing reassurance that a refund will be made if problems occur (non-authorized transaction, non-delivery or fraud).
- (3) Enhanced supervisory cooperation between Member States based on the principle of supervision by the authority of the country of establishment of the financial service provider: In the field of money laundering, digital signatures and the other identification and authentication techniques will partly reduce the risks associated with on-line and cross-border transfers. It will also be necessary to examine new risk profiles in financial services such as credit, market, interest-rate and insurance risks, which are being examined as part of a current review of prudential requirements (own funds) and solvency margins (insurance).

The E-commerce Directive is not incompatible with anonymous payment systems, as it applies primarily to transactions with banks and other financial and credit institutions, whereas anonymous electronic cash would be used essentially for transactions between individuals and merchants who are not subject to the obligations imposed by the Directive. Consequently, an individual would have to identify himself prior to withdrawing (or depositing) large quantities of e-cash from his bank, but

---

202 Communication from the Commission to the Council and the European Parliament - E-Commerce and Financial Services, Executive Summary, COM (01)66 final [hereinafter E-Commerce and Financial Services] (indicating the Commission will facilitate a country-of-origin approach to cover distance trading and other financial services); Opinion of the Economic and Social Committee on the "Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market," 3.6, 3.6.2, 1999 O.J. (C 169) 36, 38 (endorsing the country-of-origin principle that laws of the country in which the service provider is established apply).

<sup>203</sup> Commission Communication to the Council, the European Parliament and the European Central Bank of 14 May 2003 on the application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive



will be able to use it for anonymous on-line payments in essentially the same way as 'traditional' cash is used in off-line transactions. The needs of the police and law enforcement agencies seeking to track down money laundering offenders need thus to be carefully balanced against the advantages for privacy offered by anonymous payments.

One of the biggest obstacles facing on-line traders is the lack of confidence that consumers and customers have in the on-line medium. For example, many consumers are reluctant to give their credit card details over the Internet and traders are reluctant to divulge high-value information by way of e-mail. The use of appropriate encryption technology and other security measures can allay these fears but regard should be had to the implications of any breaches of such measures. The tax implications of selling online are far from clear. Even when it comes administrating a bank account over the Internet there are certain risk that all users will have to face such as the hacking of the bank accounts. Internet banking refers to the use of the Internet for the delivery of information and the provision of banking services by credit institutions to customers via a personal computer, a mobile phone, an interactive television or any other intelligent device with network capabilities. The institution can use the Internet as a supplementary channel for the supply of traditional banking services such as the opening of a deposit account or the transfer of funds between different accounts or exploit the interactive capabilities of the medium and develop new electronic services such as the electronic presentment and online payment of bills by the customer over the network.<sup>204</sup>

The characteristic contribution of the Internet in the formulation of a radically distinct concept of distant, remote and electronic provision of services lies primarily in the possibility of an integrated customer interaction with the service provider entirely via the openly accessible electronic network. This interaction starts from the very early, initial stage of the contract formation and continues thereafter. Technically it constitutes a series of mutual electronic communications, which are initiated by the customer over the network and culminate in the alteration of the relevant account data stored on the bank's electronic records. In cases where the bank operates exclusively over the Internet, this process is even more obvious. The lack of personal contact between the contracting parties, the problems associated with the establishment of secure identification procedures and the difficulty in determining the geographical elements and components of an Internet-based commercial relationship are all Internet-specific features<sup>205</sup>, which concern banking lawyers, regulators and economists and deserve some closer attention.

The suitability of the Internet as a commercial environment dedicated to the conduct of banking and financial operations have been attributed to the increasingly intangible and dematerialized character of the services provided by credit institutions<sup>206</sup>. There are indeed circumstances where a particular banking service can be technically analyzed into a sequence of communications between the bank and the customer, which starts from the very moment of the initiation of the transaction on the part of the former. The service is requested, administered and finally performed on the basis of the exchange and management of information, a process that can be effectively deployed over the Internet. The exchange of information can be seen in the process of customer identification, the communication of customer mandate, and the assessment of the customer's creditworthiness, the

---

<sup>204</sup> K.Frust et al, "Who Offers Internet Banking", p. 30, Special Studies on Technology and Banking, 19 [2000] Quarterly Journal 29-48, US Comptroller of the Currency, Washington DC.

<sup>205</sup> E.Stevens, The Internet as a Financial Services Distribution Channel, Lafferty Publications, Dublin, 1997.

<sup>206</sup> International Monetary Fund, A.Belaisch et al, Euro-Area Banking at the Crossroads, Working Paper 28, Washington DC, 2001; Bank for International Settlements, W.White, The Coming Transformation of Continental European Banking, Working Paper 54, June



agreed terms of the transaction and the transmittal of monetary value in the form of account debit and credit entries<sup>207</sup>.

Within the context of this distributed communications infrastructure, the Internet establishes two-way connectivity between network participants, which outperforms the two-way capabilities of devices like the wired and wireless telephony. The Internet is the only system that enables the simultaneous interaction of an information provider with multiple recipients on a reciprocal basis<sup>208</sup>.

The open network culture of the Internet as a global information and business society contrasts sharply with the controlled and inaccessible electronic platforms that banking institutions developed at an earlier stage in order to provide remote banking services as part of their strategy for the development of alternative delivery channels. Banking institutions and their customers share a space within a largely indeterminable information society, which consists of ever-expanding individual components, whose online activity cannot be monitored. For a business as information reliant and intensive as banking this very nature of the Internet creates significant benefits and opportunities but also highlights key vulnerabilities, risks and concerns for the banking community, their clients and policy makers.<sup>209</sup>

The Internet compromises in an unprecedented manner the accuracy with which the conduct of commercial operations has been traditionally associated for jurisdictional and regulatory purposes with a specific geographical location<sup>210</sup>. Internet technology drastically contributes to the collapse of geographical boundaries in the circulation of information and consequently in the supply of electronic commercial services.

The very essence of the Internet as a distributed telecommunications and computer network prescribes the capability of the system resources to transmit and route the requested information via any available link at any particular time. Essentially the transmission and retrieval of information is geographically impossible to trace and determine. Furthermore, it is of significant importance to note that all information resources are available from anywhere on the network. Material stored on a Web server is available to Internet clients regardless of space and time constraints. In addition, there is no connection between a domain name or an Internet address and the actual location of the concerned organization or of the hosting server<sup>211</sup>.

The repercussions for the provision of banking services via the Internet are challenging. Even though the conduct of banking operations is organized, structured and regulated at national or regional level, banking websites are accessible on a global scale. Furthermore, the computer equipment, which stores the necessary financial data and serves the bank's customers, is not necessarily established in the jurisdiction where the institution engages primarily in banking

---

<sup>207</sup> E.Katz and T.Claypoole, "Willie Sutton Is on the Internet: Bank Security in a Shared Risk Environment", pp 191-192, 5 [2001] North Carolina Banking Institute 167-231.

<sup>208</sup> E.Katz and T.Claypoole, "Willie Sutton Is on the Internet: Bank Security in a Shared Risk Environment, pp.178-186

<sup>209</sup> Price Waterhouse Coopers, Protect and Survive- Regulation of Electronic Commerce in the Financial Services Industry, pp 19-29, Report, London, July 2000.

<sup>210</sup> The volume of the international bibliography on the subject is enormous. See, e.g., D.Rice, Exploring Legal Boundaries in Cybersecurity: What Law Controls in the Issuance and Trading of Securities on the Internet, pp 8-13, 6th Interim Report for the International Law Association, London, July 2000; American Bar Association, "Achieving Legal and Business Order in Cyberspace, A Report on Global Jurisdiction Issues Created by the Internet", 2000 Business Lawyer 1806-1946.

<sup>211</sup> D.Johnson & D.Post, "Law and Borders: The Rise of Law in Cyberspace", pp 1371-1372, 48 [1996] Stanford Law Review 1367-1402.



business. Further, Internet technology provides numerous possibilities for the rerouting and reconstruction of the transmitted information. Of course banking institutions can exercise control over the access to their Internet-based services and restrict their provision within the framework of their local clientele, but available system solutions cannot prevent an authorized customer to establish his domicile in an overseas location and remotely benefit from the supplied services on an ongoing basis thereafter.

The conduct of banking operations via the Internet and the requisite integration of this new business model into the banking institution's internal organization expands the reliance and dependence of the institution on information technology. The implications for the risk profile of the entire organization are pivotal. Technology is key and omnipresent across the entire spectrum of functions within the organization. From the early stage of product conception, through product development, production, marketing, delivery and back-office reconciliation and settlement, the entire banking process relies on the smooth function of sophisticated computer applications and network systems. Therefore, the identification of risks and the design and implementation of sound risk management principles is essentially an absolutely minimum requirement for the conduct of efficient and reliable market operations to the benefit of the institution, the customers and the stability of the financial system<sup>212</sup>.

Generally the provision of the following services via the Internet has been observed in the Web sites of examined banking organizations. Such as account management and account information services to private as well as corporate customers, such as online opening of deposit accounts, display of account statements and account transaction history, bill payment, transfer of funds between accounts, management of individual as well as standing debit and payment instructions, credit card services such as online application procedures, payment services and balance and transaction statements, online application procedures for the supply of consumer credit facilities, small business loans and secured house financing, savings and investment products such as online share dealing, online application processing for the purchase of securities and interests in collective investment schemes, information and research on markets and financial operations.

The online sale of financial services is an ideal application for e-commerce The United States as all modern financial services transactions are, at heart, merely transfers of accounting information from one database to another.<sup>213</sup> However, such cross-border sales are unlawful under the laws and regulations of the customer's country if the U.S Corporation holds only the relevant U.S. federal or state licenses for its financial services offerings and is not licensed and supervised in a European Union jurisdiction.<sup>214</sup> This is because: Advertising those financial services via a Web site to EU

---

<sup>212</sup> Basel Committee for Banking Supervision, Core Principles for Effective Banking Supervision, Basel, 1997

<sup>213</sup> For example, if A sells securities to B, that sale is effected via the following information transfers:

- A's nominee account on the relevant exchange is debited with that number of shares;
- B's nominee account is credited with the same number of shares;
- B's bank account is debited with the amount of the transaction;
- A's bank account is credited with the amount of the transaction; and

The two banks alter their debit and credit balances in their accounts with each other and with their central banks. In cross-border transactions this may involve other correspondent banks and national clearing systems. There is no need for any physical movement of property (including paper) to complete all aspects of the transaction.

<sup>214</sup> Financial Services and Markets Act, 2000, c. 8, § 19 (Eng.) (requiring firms to obtain authorization to carry on regulated financial activities in the UK), <http://www.hmso.gov.uk/acts/acts2000/20000008.htm>



customers is a criminal offence;<sup>215</sup> and supplying those services to EU customers is (possibly) also an offence.<sup>216</sup>

This is almost certainly true in all other countries that have a developed banking and financial services regime. Theoretically, there is a solution—obtaining a license and becoming supervised in every jurisdiction where customers are sought. In practice, the burden of regulatory compliance is too great to make this solution economical. So far as banking services are concerned, the European Commission appears to have accepted this argument in its Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive: Unlike other services, where the place of supply can give rise to no doubts (legal defense, construction of a building, etc.), the banking services listed in the Annex to the Second Directive are difficult to pin down to a specific location. They are also very different from one another and are increasingly provided in an intangible form. The growth of distance services, particularly those using electronic means (Internet, home banking, etc), will undoubtedly soon result in excessively strict criteria on location becoming obsolete... For [technical equipment such as an ATM] to be capable of being treated as an establishment... it would have to have a management, which is by definition impossible unless the Court acknowledges that the concept can encompass not only human management but also electronic management... The presence in the host country of a person or company responsible simply for maintaining the machine, equipping it and dealing with any technical problems encountered by users cannot rank as an establishment and does not deprive the credit institution of the right to operate under the freedom to provide services. The Commission considers, however, that technological developments could, in the future, induce it to review its position. If such developments were to make it possible for an institution to have only a machine in a given country, which could “act” as a branch, taking actual decisions, which would completely obviate the need for the customer to have contact with the parent company, the Commission would be forced to consider an appropriate Community legal framework. The present legal framework rests on mechanisms, which are still based on a “human” concept of a branch (for example, the programmed of operations must contain the names of those responsible for the management of the branch). It is therefore not possible, under the existing rules, to consider machines as constituting a branch.<sup>217</sup>

The last part of this passage recognizes that Internet financial services Web sites can act autonomously, as replacements for physical branches, without being subject to the same regulation as branches, because they do not constitute a permanent establishment. However, this does not free a non-EU financial services corporation to supply services into the EU free of EU regulation, because its activities still will amount to either unlawful advertising or unlawfully doing business in the jurisdiction.<sup>218</sup>

It is important to notice the operational risks that come together with new technological developments; we usually focus on the Internet. However, other important technological elements are necessary to the development of the on-line financial services sector.

---

<sup>215</sup> CF supra 209, e.g., §§ 21(1), 25(1).

<sup>216</sup> CF supra 209, e.g., §§ 19(1), 22–23(1).

<sup>217</sup> Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, Explanatory Memorandum, art. 3, 1999 O.J. (C 30) 4

<sup>218</sup> Reed Chris MANAGING REGULATORY JURISDICTION: CROSS-BORDER ONLINE FINANCIAL SERVICES AND THE EUROPEAN UNION SINGLE MARKET FOR INFORMATION SOCIETY SERVICESHOUSTON LAW REVIEW pp 1016





These include the following<sup>219</sup>:

- Software enabling communication between different computer systems,
- A greater bandwidth to ensure cheaper and faster access by individuals as well as businesses, and
- User-friendlier internet/customer interfaces allowing the use of televisions as computer terminals or new developments in third-generation digital telephony.

These developments are necessary, together with the expansion of Internet traffic, in order to be able to use e-commerce in the offer and delivery of financial services. Nevertheless, financial institutions' exposure to technological risk will increase as they expand their use of e-commerce. The need to ensure a smooth functioning of computer networks will require investments in maintenance of networks and software.

Differences between national legislation applicable to Information Society Services can cause legal uncertainty as to which national rules apply to such services. They risk fragmenting the internal market by making less attractive the exercise of the two Treaty freedoms of establishment and provision of services. Since a general application of national consumer protection legislation may be exercised for traditional (off-line) cross-border provision, there is a potential to treat on-line and off-line provision of financial services differently, which would cause competitive distortions. Conditions applied to traditional provision should rapidly catch up with those applied to electronic provision. The directive on e-commerce can be expected to assist electronic provision of wholesale financial services. Regarding the retail end of financial markets, however, problems in cross-border provision will be similar for electronic as for traditional means. However, with e-commerce, lack of cross-border provision of services becomes more visible and appears more costly. Indeed, e-commerce could become a cost-effective means to deliver financial services products to customers irrespective of their geographical/jurisdictional location.<sup>220</sup>

As a final point the financial regulation at European level should be revisited once the need to address the remaining uncertainties becomes more urgent with the increased use of e-commerce. Harmonization has been achieved on certain aspects, often in close relation with global developments, as was the case in the field of prudential supervision. In other aspects, however, in particular relating to the protection of the consumer, little harmonization has been achieved<sup>221</sup>.

There is no general theory to provide guidance on which aspects require harmonization and to what extent. The OECD<sup>222</sup> has developed guidelines for consumer protection in the electronic marketplace. At European level, host member states supervise the application of their national rules within their jurisdiction. A clarification of measures that can be imposed for the general good is also missing.

The approach currently used in existing legislation is applied to e-commerce, without taking the opportunity to improve this or to adapt it to electronic commerce. Financial services consist of know-how and managerial techniques such as collecting and keeping of deposits, retail lending or the provision of insurance coverage by pooling risks. They materialize in structured information (bank accounts) and in contracts (loan contract, insurance policies, share sales), which both implies

---

<sup>219</sup> Hilton, A. (2000), "Internet banking: A fragile flower", CSFI, London, March.

<sup>220</sup> REPORT OF A CEPS/ECRI WORKING PARTY

<sup>221</sup> Steil, Benn (1998), Regional Financial Integration: Learning from the European Experience, Royal Institute of International Affairs, London.

<sup>222</sup> OECD E-commerce: Impacts and policy challenges, Working Paper 252, Paris.



that they can be easily traded electronically and that the application of national marketing rules, advertisement and contract laws will have important implications. Differences in national rules of conduct will be further highlighted as the use of e-commerce grows<sup>223</sup>.

## **(2) AVERTISEMENT AND THE IMPACT IN INFORMATION SOCIETY SERVICE BY THE E-COMMERCE DIRECTIVE**

Before the information age, a person's identity and information related to his or her identification, seemed to be more or less controlled. But with the advent of the information society, all that has changed. ICT's have become pervasive in our society and offer new possibilities to construct, verify and challenge identities in unprecedented ways. By now, identity and personal information have become essential vehicles for the materialization of e-commerce, e-government, e-health and other applications of the information society. Emphasis is on user-friendliness, more efficient services support, law enforcement, user-empowerment, user mobility and support for human interactions<sup>224</sup>.

In November 1992 the Commission decided to review its future policy approach in the field of commercial communications. The Commission decided that this review should be made public in the form of a Green Paper. Its aim is to seek the views of the European Parliament, the Member States and interested circles on proposals which have the objective first, of ensuring that any future initiative undertaken at the Community level is coherent with other Community policies or actions and secondly, of developing an approach which will help the Commission to evaluate possible problems of compatibility of certain national measures with Community Law.<sup>225</sup>

The term commercial communications covers all forms of advertising, direct marketing, sponsorship, sales promotions and public relations promoting products and services (packaging is not included for the reasons outlined in the introductory section). As the Information Society evolves, new forms of commercial communications will undoubtedly assume greater importance in this field.<sup>226</sup>

Online services became increasingly importance in public communication, even if the new services will not become a substitute for traditional media, they will help to meet the democratic, social and cultural needs of society. Let me illustrate this: The "Euro-stat statistics on information society in Europe" show that the Internet today is mainly seen as a source of information, with high usage rates for "reading or downloading online newspapers and magazines". Other national analyses confirm that, of the top ten subjects Internet users are interested in, pride of place goes to information on current international news, followed by travel information and offers, and then information on music, on computers and regional and local news. Hence the online services are of increasing importance in public communication, especially for young people, and we should not underestimate this role. It is therefore essential for us - with respect to the future regulatory

---

<sup>223</sup> Wenningen, J. (2000), "The Emerging Role of Banks in E-commerce", Current Issues in Economics and Finance, Vol. 6, No. 3, Federal Reserve Bank of New York.

<sup>224</sup> WP 14.0 Editors: Simone Fischer-Hübner (Karlstad University), Christer Andersson (Karlstad University) Reviewers: Gerard Lacoste (Compagnie IBM France) Peter Keller (Swisscom AG) Contract N° 507591 - 2004 by the PRIME consortium The PRIME project receives research funding from the Community's Sixth Framework Programme and the Swiss Federal Office for Education and Science.

<sup>225</sup> COMMISSION OF THE EUROPEAN COMMUNITIES Brussels, 08.05. 1996 COM(96) 192 final the Internal Market Green paper from the Commission.

[http://aei.pitt.edu/archive/00001181/01/commercial\\_communication\\_gp\\_COM\\_96\\_192.pdf](http://aei.pitt.edu/archive/00001181/01/commercial_communication_gp_COM_96_192.pdf)

<sup>226</sup> Cf. supra 220



framework of the European Union - to look at audiovisual content in a technologically neutral way and to attach importance to the impact of the medium, the number of users and the importance for the formation of public opinion.<sup>227</sup>

Although the electronic commerce directive claims to be complementary<sup>228</sup>, there are many issues that remain unclear. The following points are meant to serve as examples. First of all, there is the relationship between the information requirements in the distance-selling directive and article 5 of the electronic commerce directive on the identity of the provider.<sup>229</sup>

The definition of “Information Society Services” should be clarified as I said many times before. It is not enough to refer the definition to Directive 98/34/EC as amended by 98/48/EC. The definition clearly applies to both the electronic content of electronic material and the technical medium in which it is delivered. Advertising on-line would therefore come within the scope of the definition. We do not believe however, that the definition extends to the physical delivery of goods that may be supplied once the electronic process is completed.<sup>230</sup>

A business who wants to advertise on line is able to make it in five different ways: “advertising in online publications; banner advertising; website advertising incorporating the advertiser’s brand name; linking a website with an e-mail address to facilitate the provision of data to the advertiser, and ‘spamming’. Spamming means the sending of unsolicited e-mail by e-businesses promoting their commercial activity. The worse consequence of this practice is that the amount of e-mails can interfere on the normal functioning of the Internet Service Providers.<sup>231</sup>

The E-commerce Directive demonstrates that there is a considerable need for harmonization in the area of commercial communications, including advertising, marketing and sponsorship that should be subject to certain transparency requirements so as to ensure consumer confidence and fair-trading. These areas are very differently regulated within the EU, so the Directive provides that a commercial communication must be clearly identifiable as such and should set out clearly all terms and conditions applied;<sup>232</sup> the natural or legal person on whose behalf the commercial communication is made, i.e. a header in the web page that is clearly labeled.

The directive on electronic commerce Article 2 (f) of contains a technology neutral definition of commercial communication. It is defined as: “any form of commercial communication designed to promote, directly or indirectly, the goods, services or image of a company, organization or person pursuing a commercial, industrial or craft activity or exercising a regulated profession”.

---

<sup>227</sup> SPEECH/04/518 Viviane Reding Member of the European Commission responsible for Information Society and Media Business without frontiers: Europe’s new broadcasting landscape European Media Leaders Summit 2004 London, 7 December 2004

[http://www1.sgae.es/ua/Novedades/2004/Diciembre/UECOMRedingSPEECH-04-518\\_EN.pdf](http://www1.sgae.es/ua/Novedades/2004/Diciembre/UECOMRedingSPEECH-04-518_EN.pdf)

<sup>228</sup> Article 1(3) of the electronic commerce directive determines that this directive will complement the 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.

<sup>229</sup> Price Waterhouse Coopers for Health & Consumer Protection DG and represents their views on the Consumer Law and Information Society. Final Report Study on Consumer Law and the Information Society pp88

<sup>230</sup> DTI Consultation on the Electronic Commerce (EC Directive) Regulations 2002 DIGITAL CONTENT FORUM POSITION PAPER [http://www.dti.gov.uk/industry\\_files/pdf/ecommerce/DigitalContentForum\(2\).pdf](http://www.dti.gov.uk/industry_files/pdf/ecommerce/DigitalContentForum(2).pdf)

<sup>231</sup> Chissick & Kelman Electronic Commerce Law and Practice(2000) Sweet & Maxwell. Pp219

<sup>232</sup> Lubbock Ms ,Krosch ; E-commerce doing Business electronically London Ed 2000 pp 21



Belgium has corrected its previously inaccurate implementation of Article 6(a)<sup>233</sup>. The E-commerce Directive is concerned with the legal aspects of Information Society Services and in particular, electronic commerce within a Member States' internal market. Specifically, Article 6 stipulated that a "commercial communication shall be clearly identifiable as such". Previously, Article 6 of the E-commerce Directive had been implemented into Belgian national law by Article 13 of the Belgian Law on certain legal aspects of Information Society Services (the "Law"), on 11 March 2003. However, the Law implemented Article 6 as follows: "Immediately upon receipt, advertising shall be, as a result of its global impression (including its presentation), clearly identifiable as such and shall bear the word "advertising" in a clearly visible, clearly legible and unambiguous way". As a result of this earlier implementation, therefore, online advertising always had to include the word "advertising", even if it was clearly identifiable as such. Several online and interactive advertising business associations challenged this implementation of the E-commerce Directive. They lobbied intensively and successfully, to have the Law changed primarily on the grounds that this helped foster discriminatory practices between offline advertisers and online advertisers. The anomaly, therefore, arose because Article 13 of the Law stated that if such advertisements formed part of an Information Society Service, they should always explicitly mention the term "advertising". The Belgian Minister of Economy called this inconsistency an error. Finally, it is interesting to note that this Parliamentary Report made clear reference to the lobbying efforts of the online advertising industry and the effect these had on the decision to rephrase Article 13: "this urgent correction of the text was requested by the providers of Information Society Services and is wholly justified."<sup>234</sup>

The coordinated field is defined in art2 (h) of the E-commerce Directive. This starts off mapping a very broad scope of application covering '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.' However, this seems to be limited by the following provisions, which explain that it concerns requirements for taking up the activity (qualifications, authorization or notification) and pursuing it (behavior of the provider, quality or content of service including advertising and contracts and the liability of the provider).

This clearly seems to encompass some aspects of private law, but it goes on to explain that this does not cover requirements applicable to goods as such; the delivery of goods; or services not provided by electronic means. Recital 21 provides that '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', what is to be made of this? If this means that the home authority principle only applies to rules aimed at Internet trading its scope will be significantly restricted. However, how is this to be reconciled with the first part of art 2(h), which talks about both rules of a general nature and those, designed by Information Society services and their providers? Indeed most of the rules on contract terms and advertising will be of general provision and even the rules on distance selling will apply to all distance sellers, not just those offering Information Society services.<sup>235</sup>

---

<sup>233</sup> Directive 2000/31/EC of the European Parliament, passed on 8 June 2000

<sup>234</sup> Belgian Parliament corrects an implementation error over the use of the word "advertising"(Belgian State Gazette, 15 July 2004) Program Law of 9 July 2004

[http://www.twobirds.com/english/publications/articles/Online\\_Advertising.cfm](http://www.twobirds.com/english/publications/articles/Online_Advertising.cfm)

<sup>235</sup> Roger Brownsword and Geraint Howells, CONSUMER PROTECTION ON THE INTERNET: THE IMPACT OF THE INFORMATION SOCIETY ON LAW Draft of paper prepared by Institute for Commercial Law Studies, University of Sheffield for a special issue of the journal Contemporary Issues in Law  
<http://jsis.artsci.washington.edu/programs/europe/Netconference/HowellsPaper.htm>



The scope of the coordinated field is without prejudice to future Community harmonization 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 States “legal requirements relating to goods such as safety standards, labeling obligations, or liability for goods, or Member States” 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 preemption by public authorities concerning certain goods such as works of art<sup>236</sup>.

The German Court for example did not establish nor does the use of the Internet give rise to any additional health risks, which can be avoided only by an absolute prohibition on mail-order business in medicinal products. However, the technical potential of the Internet, in particular the ability to prepare customized interactive pages, can be used in order to ensure optimum health protection. As to the argument that virtual pharmacists are less able to react than pharmacists in dispensaries, the disadvantages which have been mentioned in this regard concern, first, the fact that the medicine concerned may be incorrectly used and, second, the possibility that it may be abused. As regards incorrect use of the medicine, the risk thereof can be reduced through an increase in the number of on-line interactive features, which the customer must use before being able to precede to a purchase. As regards possible abuse, it is not apparent that for persons who wish to acquire non-prescription medicines unlawfully, purchase in a traditional pharmacy is more difficult than an Internet purchase<sup>237</sup>.

The idea behind this is that the Information Society service provider need only comply with the regulatory requirements imposed on Information Society services in its Member State of origin. However, this “country of origin rule” does not apply to all rules and regulations. It only applies to the following “coordinated” fields<sup>238</sup>:

1. The requirements on taking up of the electronic business, e.g. requirements as to qualification, authorization or notification. (Article 2(h) (i) of the Directive)
2. The rules governing the pursuit of the electronic business, the conduct of the electronic business, the quality and content of its services or its liability. This includes the rules on advertising. (Article 2(h)(i) of the Directive)

In conjunction with the definition of place of establishment as the place where an operator actually pursues an economic activity through a fixed establishment, irrespective of where web-sites or servers are situated or where the operator may have a mail box. This definition is in line with the principles established by the EC Treaty and the case law of the European Court of Justice. Such a definition will remove current legal uncertainty and ensure that operators cannot evade supervision,

---

<sup>236</sup> Harms John Toward A Critical Theory of Advertising University of Texas at Austin

<sup>237</sup> Para 99 Case C-322/01, REFERENCE to the Court under Article 234 EC by the Landgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court between Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, on the interpretation of Articles 28 EC and 30 EC and of Article 1(3) and (4) and Articles 2 and 3 of Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (OJ 1992 L 113, p. 13), in conjunction with 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 (the Directive on electronic commerce) (OJ 2000 L 178, p. 1), JUDGMENT OF THE COURT 11 December 2003

[http://www.cr-international.com/docs/2003\\_ecj\\_deutscher\\_apothekerverband\\_11\\_12\\_2003.htm](http://www.cr-international.com/docs/2003_ecj_deutscher_apothekerverband_11_12_2003.htm)

<sup>238</sup> The European Union Takes Initiative in the Field of E-Commerce Julia Hörnle Research Assistant in E-commerce Law IT Law Unit, CCLS [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000\\_3/hornle/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/hornle/)



as they will be subject to supervision in the Member State where they are established. The Directive prohibits Member States from imposing special authorization schemes for Information Society services, which are not applied, to the same services provided by other means. It also requires Member States to oblige Information Society service providers to make available to customers and competent authorities in an easily accessible and permanent form basic information concerning their activities (name, address, e-mail address, trade register number, professional authorization and membership of professional bodies where applicable, VAT number)<sup>239</sup>.

An online advertisement should be carefully constructed to avoid the formation of a unilateral contract, which will bind the advertiser. The content represented on the advertisement could have such effect, even though the creation of such a contract does not correspond with the intention of the merchant. For that reason, a solution could be to clarify on the advertisement that it is an invitation to treat, so that nobody can interpret it as a real offer. However, sale of goods and services contracts have a bilateral character, as well as generally most contracts have<sup>240</sup>.

There is no easy answer to many questions when they are related to advertising online and offline, to complicate the aspect even more is the cross border advertising and marketing. Within the European Economic Area some progress has been made, under the Electronic Commerce Directive, towards establishing a 'country of origin' regime in which an online business established in one Member State can market goods and services online to another member state without fear of infringing the laws of the destination Member State. However, the Directive (which is in the final stages of implementation around Europe) at best only goes partway towards achieving a country-of-origin regime, so a web marketer still has to be concerned about the laws of other Member States<sup>241</sup>. For instance, the Directive contains derogations from the country of origin principle for contractual obligations in consumer contracts, a wide variety of intellectual property rights, and the permissibility of unsolicited commercial email. All these and others are left to the national law of each Member State.<sup>242</sup>

As an example usually in UK marketing and advertising rules apply as much to the Internet as to offline activities. However, the inherent cross-border nature of the Internet creates special problems. If a website is available in another country, does that fact alone mean that the website proprietor has to comply with the laws of that country? If not, how far does a website have to be targeted at a particular country to trigger its local laws? What about a promotional email sent across borders to another country? These issues have posed particular problems in the publishing field, where controversial subject matter that is legal in one country may offend against legislation reflecting the particular political, and religious or cultural concerns of the authorities in another country.<sup>243</sup>

Both in the developing online and offline world, we may perceive identities to be socially constructed in private relationships, but also in institutional arrangements where persons are identified and classified and in which decisions are taken about their desires and needs, their rights

---

<sup>239</sup> IP/00/442 Brussels, 4 May 2000 Electronic commerce: Commission welcomes final adoption of legal framework Directive [http://www.tax-news.com/asp/res/EU\\_ecom\\_dir\\_5\\_00.htm](http://www.tax-news.com/asp/res/EU_ecom_dir_5_00.htm)

<sup>240</sup> Martínez López, Mari Carmen University of Stockholm, Faculty of Law Master's Programme in Law and Information Technology 2001/2002 Electronic contracts within the European Union [http://vlf.juridicum.su.se/vlf/theses/Mari\\_Carmen\\_Martinez\\_B.PDF](http://vlf.juridicum.su.se/vlf/theses/Mari_Carmen_Martinez_B.PDF)

<sup>241</sup> Harms John Toward A Critical Theory of Advertising University of Texas at Austin

<sup>242</sup> Smith Graham **Book Marketing on the Internet** <http://www.twobirds.com/english/publications/articles/BookMktgontheInternet.cfm?RenderForPrint=1>

<sup>243</sup> Cf supra 232



and claims. Identity therefore is not a constant but a process. Keeping ourselves separate from others does not develop our identity: our identity is what others know about us. In knowing about us, power is already exercised.<sup>244</sup>

It is of key importance that consumers are acquainted with the nature of information they are confronted with. Is the information commercial or does it originate from independent sources? Since the Internet is a convergent medium that unites all possibilities of all sorts of media such as newspapers, film, telephone, broadcasting and databases, the borderline between editorial and commercial communication on web pages is often blurred.<sup>245</sup>

In addition, having knowledge or power may imply the risk of power abuse. In European countries in general, we may observe a development as a result of opportunities offered by new ICT's that the means of identification are increasingly being geared to the individual, creating an almost comprehensive picture of a person's identity. For instance, the use of numbers is increasing, with the same numbers being used for multiple purposes. Besides, a general trend in identity management is to more and more require identification with the heaviest possible means of identification, i.e. biometrics.

The balance of power therefore seems to be more and more shifting towards institutions, at the expense of the individual. Arguments for using far-reaching forms of identification like biometrics are often related to convenience (e.g. efficiency and increased speed of service delivery) and combat of fraud or even crime. However, the question remains to what extent citizens of European countries find biometrics an acceptable means for identification purposes. An important issue in this respect is whether this high identification level and, with that, the potential violation of the citizen's privacy, is in all cases needed.<sup>246</sup>

Consequently, with the increasing use of new ICT's in our society, there currently seems to be an urgent need to re-examine the concepts of identity and identification in different application areas. The new possibilities offered by ICT's may not only lead to changes in various social processes, but are also challenging existing organizational, legal and democratic arrangements for identity construction and identification in our society. Therefore, also the institutional context needs to be taken into account in re-examining processes of identity construction and identification

New forms of advertising involve more interactive aspect that allows the viewer to supply information directly to the broadcaster via a return path or to interactively explore a chosen environment for as long as he wishes. As a service supplied on individual demand, interactive advertising is an Information Society Services and thus outside the scope of the Directive. Generally speaking, however, interactive advertising tends to be initiated by the viewer on the basis of an advertisement broadcast in the framework of a linear programmer<sup>247</sup>.

---

<sup>244</sup> Burkert, H., *Privacy-Enhancing Technologies: Typology, Critique, Vision*, Agre P.E., Rotenberg, M. (eds.) *Technology and Privacy: The New Landscape*, 2001 (Third Printing), The MIT Press, Cambridge, MA/London, pp.125-142, 2001.

<sup>245</sup> Price Waterhouse Coopers for Health & Consumer Protection DG and represents their views on the Consumer Law and Information Society. Final Report Study on Consumer Law and the Information Society pp35

<sup>246</sup> Prins, J.E.J., de Vries, M., *ID or not to be? Naar een doordacht stelsel voor digitale identificatie*, Rathenau Institute, The Hague, Werkdocument 91, April 2003

<sup>247</sup> <http://lrs.ed.uiuc.edu/wp/commercialism/kids-online.html>



A blinking banner appears during the advertising spot, inviting the viewer to click on his remote control to obtain further information. The viewer enters the interactive programmes by sending a message to that effect from his remote control. It follows that, as long as the viewer has not voluntarily chosen to enter the interactive environment, the context is one of a linear broadcast of television programmes governed by the television without frontiers Directive. Furthermore, when entering a commercial interactive environment from a linear programmer, viewers are entitled to expect a level of consumer protection similar to that which they enjoy under the provisions of the television without frontiers Directive<sup>248</sup>.

Because electronic commerce relies on interactive contacts with prospective customers, attracting their attention is a core issue. Online marketing often uses strong incentives such as lotteries, free gifts or rebates, and tends towards more aggressive practices, such as comparative advertising or unsolicited e-mails (i.e. often referred to as “spamming”). With the broadband technologies that will become available in the next few years, new forms of “immersive” marketing may also become prevalent. Under a number of legal systems, such inducements may be considered contrary to honest trade practices.<sup>249</sup>

Should the standard for establishing unfair practices in electronic commerce take the specific nature of the medium into account? Given the medium’s compelling interactivity, should more stringent standards be considered? In an interactive medium like the Internet, the safeguarding of transparency and privacy is of particular importance. Unfair competition law may have to include rules requiring a clear distinction between informative text and advertising, and protecting consumers against the unauthorized collection of data for commercial purposes. Another related problem that may have to be addressed, noted above, is the flooding of users with unsolicited advertising (“spamming”)<sup>250</sup>.

As soon as the viewer has chosen to enter an interactive environment, s/he leaves the domain covered by the audiovisual regulations, and would enter it again only if choosing to return to the broadcast programme. To consider that interactive advertising falls under the scope of the TV Directive would be both impractical and out of proportion, as<sup>251</sup>:

- Interactive services can hardly be covered by provisions originally aimed at regulating broadcasting point-to-multipoint services. In this field, the viewer’s behavior should be the reference: once the viewer opts for interactivity, s/he leaves the broadcast programmers, and therefore the scope of the TV Directive.
- At a time of increasing convergence, the boundary between linear and interactive is increasingly difficult to draw: a distinction based on technical criteria (point-to-point/point-to-multipoint) seems increasingly difficult to apply. The situation may arise where a viewer entering the interactive environment might be in a point-to-multipoint situation without even being aware of it. It would then be necessary to identify sub-categories and bridges between the linear and the interactive.

---

<sup>248</sup> [www.corporate-ir.net](http://www.corporate-ir.net)

<sup>249</sup> WIPO/OLOA/EC/PRIMER DATE: May 2000 PRIMER ON ELECTRONIC COMMERCE AND INTELLECTUAL PROPERTY ISSUES <http://www.marly.de/material/docs/primer.doc>.

<sup>250</sup> Cf., supra 246.

<sup>251</sup> The EGTA's reply to the European Commission's public consultation on the Review of Directive 89/552/EEC as amended by Directive 97/36/EC, July





It would then be necessary to identify sub-categories and bridges between the linear and the interactive, which the study acknowledges. Consequently, it would seem difficult to define a clear and justified limit. Such subtleties of differentiation would lead us into a complex legal maze, impractical both for the broadcaster and the consumer! At the present time, however, it is unnecessary to include such a detailed definition at EU level. Interactive advertising should rather be left to self-regulation. Europe-wide guidelines on interactive advertising already exist<sup>252</sup>

Maybe self-regulation can play an important role in safeguarding consumers' interests. It provides a swift, flexible and cost-effective means of ensuring that consumers are neither misled nor offended, while the industry benefits from the maintenance of high advertising standards and increased consumer confidence.

In an evolving environment, we believe that self-regulation is more effective than legislation or statutory regulation, because it can adapt more quickly and easily in response to market developments<sup>253</sup>.

What, in conclusion, should thus be the scope of advertising rules in the Information Society? Should it be diverse, like it seems to be now, adapted to the special circumstances of the medium or the product and therefore implying a separate concept, adapted to the on-line world? Or should there be only one concept, applicable both to an on-line and an off-line consumer? In answering this question, the specific features of advertising on the Internet, and other media that will emerge in the Information Society, must be taken into account on the one hand, and general principles of advertising law on the other.

The last ones indicate especially - later on we shall discuss these principles more thorough - the importance of a clear borderline between advertising on the one hand and unbiased, independent information on the other. The specific features of the Internet have blurred this borderline, it is true, but the same holds true for other media in which ingenious non-spot advertising methods are constantly developed and applied.<sup>254</sup>

In conclusion the concept of commercial communications in the electronic commerce directive is suitable for the on-line world. As the Court in Rennes has put it the essential criterion of an advertising support is that it can carry an advertising message, whatever form it takes.<sup>255</sup> This particularly applies, given the fact that the consumer would not expect differences in the concept of commercial communications, dependant on media differences. This expectation could indeed also serve as a plea for a unified concept of commercial communications in the secondary law of the European Union.

---

<sup>252</sup> Le changement d'environnement pourrait constituer la limite du champ d'application de la Directive TSF qui, en principe, cesse de s'appliquer dès que le téléspectateur fait le choix (individuel) de sortir de l'environnement linéaire. “, Bird and Bird / Carat Crystal Study, pp.95

<sup>253</sup>EGTA's reply to the European Commission's public consultation on the Review of Directive 89/552/EEC as amended by Directive 97/36/EC, July pp 18

<sup>254</sup>Price Waterhouse Coopers for Health & Consumer Protection DG and represents their views on the Consumer Law and Information Society. Final Report Study on Consumer Law and the Information Society

<sup>255</sup>Court d'Appel, March 31, 2000. SA coopérative compagnie financière du credit mutuel de Bretagne v. Association Federation d'Ille et Vilains