3.7. The Committee feels that the scope for international cooperation provided for under Article 7.2 of the Commission's proposal is far too restricted in terms of which countries may participate.

4. Conclusion

4.1. In conclusion, the Committee would stress that, subject to the above reservations, it welcomes the programme as a whole. However, it would also point out that the scope of the amended version is more restrictive. Clearly, there is an urgent need to put into place measures to combat all mistreatment such as violence, abuse and sexual exploitation; however, we must not ignore the need to tackle the causes of violence. A shortcoming of the programme is also its failure to regard violence, abuse and sexual exploitation as infringements of human rights.

Brussels, 28 April 1999.

The President
of the Economic and Social Committee
Beatrice RANGONI MACHIAVELLI


(1999/C 169/14)

On 23 April 1999 the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 15 April 1999. The rapporteur was Mr Glatz.

At its 363rd plenary session (meeting of 29 April 1999), the Economic and Social Committee adopted the following opinion by 115 votes to two, with six abstentions.

1. Introduction

1.1. For the people of Europe and for European business, electronic commerce can create opportunities in terms of stronger economic growth, job creation, development prospects for new products and markets, more competitive European companies and a wide supply of goods and services for European consumers.

1.1.1. However, whether electronic commerce actually has the impact outlined above, for example on the jobs front, is contingent on various different factors. The Committee urges the Commission to carry out more intensive studies into this issue, particularly with regard to employment.

1.1.2. Benefits will be felt in particular if Europe manages to secure a strong global position in this field, especially in relation to the USA. As things stand, however, around 80% of electronic commerce is, according to OECD figures, US-generated. It is therefore vital that Europe take steps to ensure that, in future, it can utilize the opportunities presented by electronic commerce, rather than trailing behind the dynamic performance of the United States.

1.2. To bring the possible benefits fully to bear, it is necessary both to eliminate legal constraints on electronic commerce and to create conditions whereby potential users of electronic commercial services (both consumers and businesses) can have confidence in e-commerce. An optimum balance must be found between these two requirements. Given the wide scope of the directive under review and its complex interrelationship with other areas of regulation, a very careful and responsible approach will be needed.

(1) OJ C 30, 5.2.1999, p. 4.
1.3. The aim of the directive is to promote the spread of electronic commerce by helping break down legal barriers to trade. If, however, new distance selling methods are to gain broad acceptance among customers (both consumers and businesses), consideration will clearly also have to focus on ensuring that the consumer and data protection standards which apply to traditional trade are also maintained in the technical environment of electronic commerce and are enforceable in practice.

1.4. The vast majority of people in society are currently without full access to information services. Some sections of the public, particularly older people, cannot be reached by electronic means, or opt exclusively for personal contact with the parties with whom they do business. The Committee feels that non-electronic access to important everyday services (such as running a bank account) must be retained, so that certain groups within society are not precluded from using them. Also, the use of new technologies must not create barriers for certain sections of society, hindering or preventing them from using electronic commerce. European policy must therefore seek to ensure that no sections of society are denied access to information society services because they lack the technology or know-how or because of their economic position.

1.4.1. For consumers, education and training are also essential elements in facilitating wider risk-free access to information society services.

1.5. Global solutions are undoubtedly needed for forms of distribution which, thanks to technology, can so easily transcend national borders: hence the intensive discussion which has emerged recently at various international levels. A whole range of international conferences and forums have been held between governments and interested parties to tackle this issue. These include the OECD conferences held in Turku in November 1997 and Ottawa in October the following year, the G7 ministerial conference in Brussels in February 1995 and the June 1997 ministerial conference in Bonn. Much work in this field has also been initiated under WTO auspices. Of course progress has been made at these levels, but the outcome of the talks and negotiations has currently often been confined to general principles.

1.6. This is why European-level initiatives are also essential if we are to exploit the economic and social opportunities open to Europe. Since electronic commerce profoundly alters business relations and the way in which people live together, Europe has launched a number of schemes designed largely to establish a clear framework for the continued development of this type of commerce. The aim is to promote investments in electronic commercial services which will have a positive impact on EU growth, competitiveness and employment.

1.6.1. These schemes include:

- the Communication on a European initiative in electronic commerce, (1)

- the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions — ensuring security and trust in electronic communication — towards a European framework for digital signatures and encryption, (2)


- the Communication — globalization and the information society — the need for strengthened international co-ordination, (4)

- the proposed action plan on promoting safe use of the internet (5) which aims, through a range of measures, to boost trust in the networks and is thus an element in the drive to promote electronic commerce,

- a recent European Parliament resolution of 14 May 1998 also calls on the Commission to submit, as quickly as possible, a proposal for a directive to address these issues in a coherent way.

2. The Commission proposal

2.1. The proposed directive seeks to eliminate legal uncertainties and obstacles caused by national legal differences by finding solutions in five key areas. The aim is to establish a coherent framework for electronic commerce.

2.2. The five areas tackled in the proposal are as follows:

2.2.1. Establishment of providers of information society services: The place of establishment is defined. Special authorization regulations for information society services are to be prohibited. Providers must fulfil certain information requirements in order to ensure the transparency of their activities.


2.2.2. Commercial communications (advertising, direct marketing, etc.): The proposal defines what constitutes a commercial communication and makes it subject to certain transparency requirements. Commercial communications must, for example, be clearly recognizable as such, and the parties on whose behalf they are made must be clearly identifiable. Unsolicited commercial communications must also be clearly identifiable as such by the user.

2.2.3. Contracts: Member States are to adjust their national legislation to ensure in particular that formal requirements do not hamper the use of electronic contracts in practice. The proposal also seeks to remove legal uncertainties by clarifying in certain cases the moment at which the contract is deemed to be concluded.

2.2.4. Liability of intermediaries: The aim is to clarify the responsibility of on-line service providers for transmitting and storing third party information. The proposal establishes a 'mere conduit' exemption and limits service providers' liability for other intermediary activities.

2.2.5. Implementation: The proposal encourages the development of Community-level codes of conduct and administrative cooperation between Member States. It facilitates the establishment of effective cross-border alternative dispute resolution systems and opens up the possibility of dispute settlement out of court.

3. General comments on the draft directive

3.1. Electronic commerce is undoubtedly hampered by differences and lack of clarity in the legal framework, which prevent its benefits from being fully felt. Moves to offer more legal certainty to providers and users are therefore to be welcomed.

3.1.1. The Commission has shown good timing in its submission of the proposed directive since, in most Member States, legal transactions and commerce by electronic means are a live issue. There is a clear material link, particularly with the electronic signatures directive (1).

3.2. The main aim of the Commission proposal for a directive on certain legal aspects of electronic commerce in the internal market is to remove legal barriers which could impede the spread of electronic services across Europe.

3.3. The Committee expressly welcomes the accompanying consumer protection measures set out in the proposal (e.g. information to be furnished by the provider, development of out-of-court dispute settlement). The Committee feels it is crucial that electronic commerce should not be promoted at the expense of consumer protection standards.

3.4. Basically, unless warranted on practical grounds, there should be no difference in the legal environment of electronic commerce and established trade. In terms of technology, there should be a level playing field. Discrimination and distortions of competition may arise because established trade, by its very nature, may need to be subject to other specific regulations such as building standards. The Committee feels that this factor must be borne in mind when considering how to improve the environment for electronic commerce.

3.5. This directive is distinctive in that, although wide in scope, covering areas such as commercial communications and electronic contracts, only partial harmonization is provided for in individual fields. More far-reaching rules may be adopted at national level only on completion of a committee procedure (Article 22).

3.6. The country-of-origin principle applies to those areas which, although not harmonized by the directive, still fall within its scope. This means that the legal arrangements of the country in which the service provider is established apply. The point of departure is the view that it is difficult for providers to be guided by the law of the countries in which they do business.

3.6.1. The present directive does not change existing Community law. However, that in no sense rules out possible conflict with Community law as implemented in the Member States. Some consumer protection directives lay down only minimum provisions. For instance, Article 14 of the Directive on the protection of consumers in respect of distance contracts (2) allows Member States to introduce or maintain a higher level of consumer protection, including bans, in the general interest, on the distance marketing of certain goods and services (such as medicinal products).

3.6.2. The Committee broadly endorses the idea behind the country-of-origin principle. It cuts the legal costs of information society service providers and thus works to their advantage, essentially as desired. It also makes for better implementation of protective measures by the appropriate authorities in the country of origin.

3.6.3. On the demand side, however, and for consumers in particular, the application of this principle means grappling with various legal systems which determine the content, quality and legal certainty of information society services. National systems differ and conditions often vary quite considerably as a result. In practice, therefore, this principle may pose risks to users in cases where their own countries' arrangements no longer afford the requisite protection.


3.6.4. Since the consumers of one Member State may be unfamiliar with their rights under the law of another State where the service provider is based, the Member States and the European Commission should ensure the rapid establishment of a cross-border network of consumer protection agencies or ombudsmen to act as conduits and possibly arbitrators in the event of disputes between consumers in one country and service suppliers based in another. Such a network would preserve the concept of the single market while providing simpler, cheaper and more effective means of redress for consumers than litigation, although their rights to initiate litigation if they remain dissatisfied would remain.

3.6.5. Thus, while fully understanding simplification as far as the provider is concerned, the Committee feels that, as long as high-level harmonization is lacking, an extremely responsible approach is called for here and further consideration is required. The draft directive backs such an approach, setting out areas in which the general principle is not fully brought to bear.

3.6.6. The Committee would suggest that further exemptions may be justified where Member States’ legal systems vary widely or in areas considered highly sensitive by public opinion in the Member States (e.g. advertising directed at children, games designed for advertising purposes, medicinal products sold by mail order, regulated professions). The blanket application of the country-of-origin principle, for example in advertising, could expose consumers to advertising practices which they have never before encountered. In sensitive areas especially, ‘forum shopping’ i.e. where the choice of location is based on where the rules are most favourable for the provider, would raise difficulties, particularly since SMEs have only limited scope in this regard. Principles should therefore be established as a guide for determining areas in which the country-of-origin principle applies and areas where, as yet, this is not possible. No-one disputes that such considerations should not be allowed to generate obstacles to the single market. Beyond that, the aim over time should be to achieve high harmonized standards.

3.7. The Committee notes that the wording of many of the provisions set out in the proposal are unclear and must be reworked in more precise terms.

4. Specific comments

4.1. Article 2: Definitions

4.1.1. The Committee would point out that, with the increasing convergence of technologies, definitions may rapidly be superseded. As the Green Paper on the convergence of the telecommunications, media and information technology sectors(1) makes clear, converging markets are set to spawn hybrid services which combine features of different classic categories of service. In the case of multi-media applications, such as television sets with integrated internet browsers, computers able to receive television and radio transmissions (radiotelephony and internet voice telephony), it will gradually become impossible to draw clear boundaries between individual and mass communication.

The Committee feels, therefore, that this factor should be borne in mind in the ongoing consideration of the draft directive and that the final definitions should accommodate possible new developments, thus ensuring that they are not very quickly superseded.

4.1.2. The definition of ‘information society services’ in particular raises a whole range of borderline issues, which are not fully resolved even taking account of Directive 98/48(2) and especially Annex V thereof. For clearer understanding and to avoid any ambiguity, the Commission should, as in Annex V of the said directive, draw up negative and/or positive lists for existing services.

4.1.3. Similar ambiguities apply to the definitions of ‘coordinated field’, ‘commercial communication’ and ‘established service provider’.

4.1.4. The term ‘consumer’ should be defined as follows: A consumer is any physical person resident in the Community dealing under contracts covered by this directive for purposes which cannot be regarded as forming part of that person’s commercial or professional activity.

4.1.5. As the scope of this directive will raise many questions and is highly relevant, precision in this regard will be particularly necessary.

4.2. Article 3: Internal market

4.2.1. Article 3 stipulates that each Member State is to ensure that the information society services provided by a service provider established on its territory comply with legal provisions (country-of-origin principle). The impact of the country-of-origin principle has already been discussed in point 3.6 above.

4.3. Article 4: Principle excluding prior authorization

4.3.1. This article stipulates that access to information society services is not subject to any special requirements. However, as set out in the proposal, this should not affect other general authorization arrangements.

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(1) COM(97) 623 final, ESC Opinion, OJ C 214, 10.7.98, p. 79.

4.4. Article 5: General information to be provided

4.4.1. The Committee is glad that the information requirements are to include details of the service provider. The Committee would also recommend that explicit reference be made to the minimum information requirements laid down in Directive 97/7/EC on distance contracts. Article 4 of this directive sets out all the information which must be provided to the consumer before a contract is concluded. In particular, this also includes the requirement to give consumers, prior to the arrangement of any contract, clear, accurate and comprehensive information on the law to be applied to that contract and on the provisions of Article 6 giving customers the right of withdrawal.

4.4.2. However, the Committee feels that other, additional information would be useful, without, however, overburdening consumers and providers with a surfeit of data (e.g. regions in which the services are available, period of validity, probable delivery time, insurance, general conditions of sale).

4.4.3. In addition, specific warnings should be given about product safety. Alerting customers to possible risks (e.g. by notices on goods or instructions for use) is an important factor in any decision to buy.

4.4.4. Customers should also be informed about restrictions on distribution, download times (where possible) and licensing conditions for software products.

4.5. Article 6: Commercial communications

4.5.1. In the traditional media, there is a fairly clear distinction between advertising and editorial content. However, this dividing line risks becoming blurred, making it all the more essential to counter such trends in electronic commerce.

4.5.2. Purchasers (whether trade or final consumers) can adequately assess advertising and marketing only if they can clearly recognize it as such. The Committee therefore expressly endorses the obligations to provide information set out in Article 6.

4.6. Article 7: Unsolicited commercial communication

4.6.1. For recipients of commercial communications, the point is often not only the unsolicited nature of electronic advertising, but also, thanks to technology, its sheer volume, and the resulting costs in terms of telephone charges and storage capacity. Volume also presents difficulties for providers.

4.6.2. The draft directive stipulates that unsolicited electronic communication by e-mail must be identified as such. This is designed to give both recipient and provider the opportunity to use software to filter out unwanted e-mail advertising (`opt-out'). That said, it is the recipient who has to take the initiative here.

4.6.3. These arrangements are not perfect, however. Providers cannot filter mail unless requested to do so by the user — except in the case of obvious spammers — since otherwise those users desiring the information would not receive it. Secondly, users finding their mailbox full after being absent for any length of time are denied access to their desired (e.g. private) mail.

4.6.4. For this reason, the Committee would propose considering another possibility, namely user opt-in, where users exercise self-determination by expressing an explicit interest in receiving information. This opt-in option is available to Member States (see Annex II), but should be provided for across the board.

4.7. Article 8: Regulated professions

4.7.1. Here, the directive touches on a development which is widely observed in the regulated sectors, i.e. the emergence of an open, positive attitude towards information society services. In this regard, the directive recognizes the continued need for regulation in order to ensure that general interests are afforded the requisite protection (protection of consumers and other parties involved, reliable service provision, prevention of abuses etc.) This is broadly to be welcomed. However, in specific cases, care will be needed to determine the extent to which Member States’ express regulatory remit and the subsidiarity principle make it possible to act at European level. The Committee would point out the flaw in providing for codes of conduct to be drawn up by professional associations and organizations without laying down appropriate criteria on which to base them.

4.8. Article 9: Electronic contracts

4.8.1. Certain types of contract are subject to formal requirements, not only under national rules but under EU legislation as well (e.g. the consumer credit directive). In certain cases, therefore, there is a recognized need for rules stipulating that the contract should be in writing to facilitate proof and to make the parties aware of the significance of the contract they are entering into. Article 9 of the directive instructs the Member States to remove any legal requirements which ‘prevent the effective use of electronic contracts’ or which result in such contracts ‘being deprived of legal effect and validity’.

4.8.2. It is beyond dispute that, as a matter of principle, electronic agreements should be effective. In sensitive areas of


business, however, there must be scope to attach certain conditions to legal validity. Parties to an electronic commerce contract are no less in need of protection than those entering into traditional contracts. In the case of sensitive contracts or declarations drawn up or delivered electronically, therefore, the Committee would stress the need for arrangements equivalent to existing formal requirements.

4.8.3. This is why, logically, the draft electronic signatures directive(1) does not touch on the legal validity of contracts. The Member States are thus free to make certain encryption features mandatory for some types of contract. Member States are also at liberty to exclude certain types of contract completely from the scope of the electronic signatures directive, or to lay down additional requirements — such as an electronic signature with special safety features — for the validity of formal contracts concluded by electronic means. Together with the framework established by this directive, the use of electronic signatures is a key element needed to boost electronic commerce.

4.9. Article 10: Information to be provided

4.9.1. A clear introduction to how services are used makes for transparency and prevents misunderstandings and the undesirable legal consequences they involve. It is therefore wholeheartedly welcomed.

4.10. Article 11: Moment at which the contract is concluded

4.10.1. To conclude a contract with legal effect, the service provider must issue an acknowledgement of receipt, which must be reconfirmed by the buyer. The Committee welcomes the clear arrangements for determining the moment at which a contract is concluded, and the proposal to establish a mechanism enabling the user of the service to identify and correct handling errors. The Committee would point out that the term ‘offer’ must be clearly defined to prevent loopholes. For example, in some Member States, an ‘offer’ on a website may be understood by the customer as an ‘invitation to prepare an offer’. Clarification is needed here.

4.10.2. It is not clear who would be held responsible for the loss of a message as the result of a technical defect. Moreover, it is in any case doubtful whether final consumers are yet sufficiently aware that all electronic terminals have to be checked regularly for messages which may have a legal bearing.

4.11. Articles 12-15: Liability of intermediaries

4.11.1. With regard to liability, the introduction of a graduated system of exemptions and restrictions establishes a common framework, allowing the diverse activities of internet providers to be assessed separately; assessment is based on providers’ degree of involvement with the content transmitted and their scope for monitoring content. The Committee welcomes efforts to establish clear rules on the responsibility of service or information society providers and shares the view that the ‘manufacturer’ of information should bear primary responsibility for its content.

4.11.2. Articles 12 to 15 partially exempt intermediaries from liability for the information transmitted. For the sake of clarity, it should be expressly stated that, although, in the circumstances described, the provider is not liable for lack of content control, liability for conduct relevant to data protection under data protection and telecommunications law remains unaffected.


4.12.1. Access to legal redress in the event of dispute is crucial to people’s acceptance of electronic commerce. For minor legal proceedings especially, alternative dispute settlement arrangements can be an ideal complement to legal protection via the courts. In taking account of out-of-court dispute settlement procedures, the draft directive addresses an issue which, given the courts’ excessive workload, is becoming increasingly important everywhere. Speeding up dispute settlement at moderate cost contributes significantly to ensuring that ordinary people have equal access to the law, but can only succeed if (i) a certain minimum level of quality is guaranteed and (ii) the complete range of available options is used to the full.

4.12.2. In this context, the Committee would also encourage a role for existing European consumer information offices.

4.13. Article 18: Court actions

4.13.1. Interim injunctions have without doubt proved a valuable tool. The Committee is pleased that they are also to be used in conflicts relating to electronic distance contracts. Extending the scope of the injunctions directive(2) to cover infringements of the present directive is also appropriate.


4.14.1. Member States may comply with the obligation to provide assistance and meet requests for information only within the framework of existing laws on confidentiality and data protection.

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4.15. **Article 22: Derogations**

4.15.1. The draft provides for various types of derogation. National ‘measures’ must pass through the Commission’s committee procedure. The proposed committee procedure means that the Commission can subsequently amend the scope of the directive without further ensuring the appropriate involvement of the Member States and the European Parliament under the co-decision procedure pursuant to Article 189b of the Treaty establishing the European Community. Furthermore, the power to be vested in the Commission under Article 22(3)(d) to decide on the compatibility of measures with Community law may affect the remit of the European Court of Justice.

4.15.2. Moreover, only court decisions are clearly excluded from these arrangements. Clarification should be given as to whether the word ‘measures’ in the third paragraph refers to administrative measures or also includes legislation.

4.16. **Annexes**

4.16.1. Annex I should be reviewed to check whether games of chance and pyramid games are also excluded from the scope of the directive, particularly Article 3.

4.16.2. The legal areas listed in Annex II are excluded from the scope of the country-of-origin principle. These include ‘contractual obligations concerning consumer contracts’. It should however be ensured that this derogation applies not only to contractual, but also of course to legal obligations in relation to consumer contracts. These include, for example, the obligation to warn of risks and to act with due care and attention. However, some way will have to be found to distinguish commercial communications, where requirements are not subject to precontractual obligations in the narrow sense.

Brussels, 29 April 1999.

*The President*

*of the Economic and Social Committee*

Beatrice RANGONI MACHIAVELLI