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**REPORT FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND
THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**First Report on the application of 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)**

TABLE OF CONTENTS

1.	INTRODUCTION.....	3
2.	ECONOMIC AND TECHNOLOGICAL DEVELOPMENTS IN E-COMMERCE ..	4
3.	TRANSPOSITION OF THE DIRECTIVE	6
3.1.	Transposition timetable.....	6
3.2.	Characteristics of transposition.....	6
3.3.	Follow-up to transposition	7
4.	APPLICATION OF THE DIRECTIVE.....	8
4.1.	Internal Market.....	8
4.2.	Establishment and information requirements.....	9
4.3.	Commercial communications.....	9
4.4.	Regulated professions	10
4.5.	Electronic contracting	11
4.6.	Liability of internet intermediaries.....	12
4.7.	Notice and take down procedures	14
4.8.	Codes of conduct and out-of-court dispute settlement.....	16
4.9.	National e-commerce contact points.....	17
5.	INTERNATIONAL ASPECTS	18
5.1.	International developments in e-commerce	18
5.2.	Enlargement	19
6.	EVALUATING THE BENEFITS OF THE DIRECTIVE	19
7.	ACTION PLAN FOR THE FOLLOW-UP OF THE DIRECTIVE.....	20
7.1.	Ensure the correct application of the Directive.....	20
7.2.	Enhance administrative cooperation between Member States.....	20
7.3.	Raise information and awareness with business and citizens	21
7.4.	Monitor policy developments and identify areas for additional action.....	21
7.5.	Strengthen international cooperation and regulatory dialogue	21
8.	CONCLUSIONS.....	22

1. INTRODUCTION

This report provides the first assessment of the transposition and application of Directive 2000/31/EC on electronic commerce¹ ("the Directive") and its impact. It is based both on the Commission's experience and on feedback received from Member States, industry, professional and consumer associations and other interested parties of their experience with the Directive. In view of the short period of time since the adoption and transposition of the Directive, such experience is necessarily limited. However, it shows that the Directive has had a substantial and positive effect on e-commerce within Europe. Together with the Directive on transparency for information society services², which establishes a mechanism allowing the Commission to assess draft national legislation as to its compatibility with Community law, it creates a straightforward Internal Market framework which allows e-commerce to grow across national borders.

Work at European level aiming to promote the development of e-commerce started at an early stage with the Commission's 1997 Communication "A European Initiative in Electronic Commerce"³. This set a clear objective of creating a coherent European legal framework for e-commerce by the year 2000.

Its importance was underlined by the 2000 Lisbon European Council, which set a new strategic goal for the European Union for the next decade: to become the most competitive and dynamic knowledge-based economy in the world. The Lisbon Council underlined that both citizens and business must have access to inexpensive, world-class communications infrastructure and a wide range of services and that realising Europe's full e-potential depended on creating the right conditions for e-commerce and the internet to flourish.

The Directive, which was adopted soon after the Lisbon Council, is fully in line with this objective. It removes obstacles to cross-border online services in the Internal Market and provides legal certainty to business and citizens alike. In so doing it enhances the competitiveness of European service providers, and stimulates innovation and job creation. It also contributes to the free flow of information and freedom of expression in the European Union.

The Directive provides a light and flexible legal framework for e-commerce and addresses only those elements which are strictly necessary in order to ensure the proper functioning of the Internal Market in e-commerce. It is drafted in a technologically neutral way to avoid the need to adapt the legal framework constantly to new developments.⁴ It covers a wide variety

¹ 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), OJ L 178, 17.7.2000, p. 1.

² Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21.7.1998, p. 37 as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ L 217, 5.8.1998, p. 18. On 13.2.2003 the Commission adopted a report to the European Parliament and the Council which specifically evaluates the application of Directive 98/34/EC in the field of Information Society Services (COM(2003)69). The report underlines the benefits of the procedure, confirming the value of this Directive as an effective internal-market tool in this new economic field.

³ COM(97) 157 final, 16.4.1997.

⁴ For instance, technological applications (WAP or PDA-sets) enabling the content to be accessed by a specific device do not constitute "modification of information" within the meaning of Article 12, but merely "technical specification of content".

of services provided online (so-called "information society services") ranging from online newspapers and specialised news services (such as business or financial information), online selling of various products (books, computer hardware and software, pharmaceuticals, etc.) to the online provision of financial services (online banking, online investment). The latter are of particular importance as they are particularly suitable for cross-border delivery, which the Commission has recognized in its Communication on E-commerce and Financial Services⁵. The Directive applies horizontally across all areas of law which touch on the provision of information society services, regardless of whether it is a matter of public, private, or criminal law. Furthermore, it applies equally both to business-to-business (B2B) and business-to-consumer (B2C) e-commerce.

The cornerstone of the Directive is the Internal Market clause which creates the legal certainty and clarity needed for information society service providers to be able to offer their services throughout the entire Community. The provisions on the liability of intermediaries create legal certainty for intermediary service providers and thus help to ensure the provision of basic intermediary services in the internet. At the same time, the Directive's provisions on information and transparency requirements, its rules on commercial communications, and the basic principles regarding electronic contracts provide for high standards in the conduct of online business in all Member States, thus also increasing consumer confidence.

Due to the fact that the Directive was one of the first legal instruments which approached a broad range of legal issues related to several aspects of the development of e-commerce and which provided a coherent set of legal rules for e-commerce as such, it has attracted a considerable amount of attention amongst regulators at international level and is a model for national, regional, or global regulatory initiatives⁶.

In parallel with the putting into place of the legal framework, work continues at European level with the aim of stimulating the development of e-business and e-government. In particular, the Commission set out a coherent strategy in its eEurope Action Plan, which was adopted in 2002 in order to continue with the realisation of the goals set by the Lisbon Council.⁷

2. ECONOMIC AND TECHNOLOGICAL DEVELOPMENTS IN E-COMMERCE

Despite the downturn that affected the e-economy, e-commerce is steadily increasing in the European Union. Gradually, online success stories are emerging, for example online market-places, business-to-business (B2B) platforms, and online finance. Development in the use of the internet has been rapid. There are estimated to be already 185 million European internet users.⁸ Since the adoption of the Directive, growth in internet penetration in EU households has moved from 18% in 2000 to 43% in November 2002. Internet penetration in businesses is naturally much higher. Even amongst small enterprises (0-49 employees), by 2002, 84% had

⁵ COM(2001) 66 final, 7.2.2001.

⁶ UNCITRAL refers to the Directive in its on-going work on electronic contracts, cf. most recently the report on the 41st session of the Working Group on e-commerce at <http://www.uncitral.org/en-index.htm>; Mercosur is in regular dialogue with the Commission on legal issues relating to e-commerce.

⁷ On research and development, see also Information Society Technologies 2003-04 Work Programme of the European Commission, available at <http://www.cordis.lu/ist>.

⁸ Source: Interactive Advertising Bureau UK, 2002, <http://www.iabuk.net>. This is estimated to grow to 190 million by the end of this year by eMarketer, <http://www.europemedia.net>.

access to the internet. Approximately 70% of EU companies have their own website.⁹ More than two-thirds of SMEs use the internet as a business tool. The internet is a key factor for them to increase their competitiveness and to create new products and services.

Since the adoption of the Directive, the potential of e-commerce has, in addition, been growing due to the technological development of broadband and multiplatform access i.e. the possibility of connecting to the internet via other means than a PC, such as digital TV and third generation mobile phones.¹⁰ These developments are opening up a large variety of new opportunities for online services. New services, applications and content will create new markets and provide the means for increasing productivity and hence growth and employment throughout the economy. They will also provide both citizens and business with more convenient access to information and communication tools.¹¹

Currently e-commerce represents only about 1-2% of retail sales in the EU, but the prospects for growth are promising: for instance, online Christmas shopping in 2002 saw an increase of 86% over the previous year. At present only about 12% of enterprises are selling online with tourism, financial services, publishing and software being the leading sectors, but their online purchasing has developed much faster.¹² However, according to estimates, B2C e-commerce is expected to increase from €10 billion in 2000 to €70 billion in 2003.¹³ It is estimated that 54% of European internet users will shop online by 2006.¹⁴

In addition, online advertising is a fast growing sector. It has been predicted that growth in online advertising spending will outpace growth in total media spending in 2003.¹⁵ Total spending on advertising grew about 2% in 2002, but online advertising has been growing about ten times faster.¹⁶ Given the number of flexible forms which online advertising can take¹⁷, and the relative speed with which marketers can modify the elements used in an online advertising campaign, marketers have been quick to utilise the various online advertising techniques available and to innovate in order to best suit the needs of potential customers, creating a more interactive marketing process.¹⁸ Indeed, the internet has become a powerful tool for consumers to obtain information and compare offers in an efficient and user-friendly way, i.e., to make "pre-sale searches" enabling consumers to rapidly obtain information

⁹ The European e-Business Report 2002/2003 edition, the Business W@tch of the European Commission, either at www.europa.eu.int/comm/enterprise/ict/policy/watch/index.htm or at www.ebusiness-watch.org.

¹⁰ Communication of the European Commission "Towards the Full Roll-Out of Mobile Communications", COM(2002) 301 final, 11.6.2002.

¹¹ eEurope 2005: An information society for all, COM(2002) 263 final, 28.5.2002.

¹² eBusiness W@tch (reference above). In the UK and Germany, for instance, more than 50% of enterprises say they already use e-procurement.

¹³ European Information Technology Observatory, <http://www.eito.org>.

¹⁴ Interactive Advertising Bureau UK, 2002, <http://www.iabuk.net>.

¹⁵ eMarketer's Media Spending Outlook white paper, 2002.

¹⁶ In France and the UK record levels for online advertising have been noted in the second half of 2002, with a 52% increase in the UK compared with 2001 and a doubling of its size in France from 153 million euros in 2001 to 309 million euros in 2002, see "Europe's marketers switch to on-line", Interactive Advertising Bureau UK, June 2003.

¹⁷ E.g. banner ads, pop-up ads, keyword searches.

¹⁸ For example, once a contact has been made with a customer (and his consent given), businesses are able to tailor product offers to individual customer requirements allowing for personal 'one to one' offers by e-mail. The gradual switch from the use of pop-up ads to more user-friendly keyword-search related ads reflects the development of user-friendly advertising techniques.

concerning the range and characteristics of products and services available both throughout Europe and globally.¹⁹

The competitiveness of EU service providers has recently been substantially improved in e-commerce by the entry into force of the Directive relating to VAT on digital services on 1 July 2003²⁰, which eliminated competitive disadvantages suffered by EU service providers. The rules on electronic VAT compliance such as e-registration, e-filing and e-invoicing were also modernised.

3. TRANSPOSITION OF THE DIRECTIVE

3.1. Transposition timetable

The deadline for Member States to transpose the Directive into national law was 17 January 2002, 18 months after the entry into force of the Directive on 17 July 2000. The Council and the European Parliament accepted a relatively short transposition period having agreed that setting up a legal framework for e-commerce was a matter of priority.

There were, however, some delays in transposition, due mainly to the horizontal nature of the Directive, which affects a large variety of legal issues²¹. So far 12 Member States²² have brought into force implementing legislation. In the remaining 3 Member States²³, work on the transposition of the Directive is well advanced. The Annex to this Report contains a list of national measures transposing the Directive.²⁴

3.2. Characteristics of transposition

In general, national transpositions have closely followed the form and content of the Directive²⁵. Member States, with the exception of the Netherlands, decided to transpose the Directive by a horizontal e-commerce law in order to create as clear and user-friendly a national framework as possible. Germany transposed the Directive by modifying its

¹⁹ Online advertising, websites, e-mails, and search engine marketing have a distinct impact on the process of purchasing products even where the product is not sold on-line, see DoubleClick, Touchpoints: Effective Marketing Sequences in the Interactive Media Age, March 2003, http://www.doubleclick.com/us/knowledge/documents/research/dc_touchpoints_0303.pdf.

Sound statistics on the magnitude of the use of internet for pre-sale research is still lacking, however, surveys indicate that the figures are significant, see Research by the Interactive Advertising Bureau UK on the reach of interactive media around Europe.

²⁰ Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services, OJ L 128, 15.5.2002, p. 41. See also Council Regulation (EC) 792/2002, OJ L 128, 15.5.2002, p. 1.

²¹ These reasons came out in bilateral contacts with the Member States during the transposition. Many Member States, for instance, needed time to ensure wide national consultations of interested parties.

²² Belgium, Denmark, Germany, Greece, Spain, Ireland, Italy, Luxembourg, Austria, Finland, Sweden, United Kingdom. Of those, three Member States (Germany, Luxembourg, and Austria) transposed the Directive by the deadline of 17 January 2002.

²³ France, Netherlands, and Portugal.

²⁴ In addition, the three EEA-countries, Iceland, Liechtenstein and Norway (Norway with the exception of the liability provisions, which will be separately implemented) have passed the implementing legislation. For accession and candidate countries, see section 5.2.

²⁵ As regards France, the Netherlands and Portugal, this comparison and other references in this report have been done on the basis of their draft laws, as the final laws were not yet available.

Teleservices Act.²⁶ The United Kingdom transposed the Directive in two parts: the general aspects and the financial services aspects. Belgium separated the main parts of the Directive and the Article 3(4)-(6) procedure into two separate laws for constitutional reasons.

In most Member States attention at the transposition stage was focused on the Internal Market clause and the provisions concerning liability of intermediary service providers. In addition, the correct transposition of the Directive has required a number of Member States to screen and modify existing national laws, for instance in order to remove obstacles to electronic contracting²⁷. Some Member States included certain additional elements not covered by the Directive in their national laws: the liability of providers of hyperlinks and search engines²⁸, notice and take down procedures for illegal content²⁹, registration requirements for information society service providers³⁰, filtering³¹, data retention³², cryptology³³, and additional rules on electronic contracting. Some Member States also included within the scope of their national e-commerce law matters excluded from the scope of application of the Directive, such as online gambling.³⁴

Throughout the transposition procedure the Commission services were in close cooperation with all Member States to provide them with assistance in ensuring the correct transposition of the Directive. Moreover, the large majority of the Member States notified their draft laws under the transparency procedure laid down in Directive 98/34/EC³⁵, since those drafts contained other rules affecting information society services, thus going beyond the mere transposition of the Directive. Both the close bilateral contacts with Member States and the notification procedure gave the Commission services an opportunity to thoroughly analyse and comment on the draft laws prior to their final adoption. This appeared to be a successful means of improving the quality of national transpositions.

3.3. Follow-up to transposition

According to the Commission's preliminary evaluation, transposition of the Directive is, in general, satisfactory. Nevertheless, analysis of the final laws as adopted by the Member States will need to continue in 2004. The preliminary analysis indicates that one or two adopted laws contain problems related, in particular, to the transposition of the provisions concerning the liability of internet intermediaries. Before taking any formal steps, the Commission services intend to launch a dialogue with the Member States concerned to discuss the different options for solving these problems.

²⁶ Germany was the only Member State which had already set up a horizontal legal framework at the national level prior to the adoption of the Directive, by virtue of the Teleservices Act (Teledienstegesetz vom 22. Juli 1997).

²⁷ Consistent with Article 9.

²⁸ Spain, Austria, and Portugal (see the liability section below for further details).

²⁹ Finland has a copyright-specific notice and take down procedure laid down by law (as does EEA-country Iceland).

³⁰ Spain and Portugal.

³¹ France.

³² Spain.

³³ France and Luxembourg.

³⁴ E.g., Spain, Austria, Luxembourg, and EEA-country Liechtenstein excluded gambling from the scope of the Internal Market principle only, with the effect that other parts of the national transposing measures apply fully to the provision of online gambling services.

³⁵ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, p. 37, as modified by Directive 98/48/EC, OJ L 217, 5.8.1998, p. 18.

4. APPLICATION OF THE DIRECTIVE

4.1. Internal Market

The borderless nature of e-commerce required that the legal framework put in place for its operation had to provide legal certainty to both business and consumers. This legal certainty is brought about, along with other flanking measures, by the core feature of the Directive, the Internal Market clause.

This provision takes the form of two complementary features: each Member State must ensure that a provider of information society services established on its territory complies with the national provisions applicable in that Member State which fall within the "coordinated field"³⁶, even when he provides services in another Member State; in turn, Member States may not, for reasons falling within the co-ordinated field, restrict the freedom to provide information society services from another Member State.

The Internal Market clause is subject to some limited derogations which are set out in the Annex to the Directive. There is also a case by case derogation to the Internal Market clause which Member States may use to take measures, such as sanctions or injunctions, to restrict the provision of a particular online service from another Member State where there is a need to protect certain identified interests, e.g. consumers.³⁷ Any measures taken by a Member State relying on this provision are subject to strict conditions under Article 3(4)-(6).

Contrary to the expectations of some Member States that they would have frequent need to use this derogation, to date this has not been the case. The Commission has received only 5 formal notifications, all coming from the same Member State and all dealing with essentially the same problem (i.e. the fraudulent use of premium rate numbers), two of which made use of the 'emergency' procedure provided for by Article 3(5).³⁸ In May 2003, the Commission issued a Communication on the application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive³⁹ providing guidance on the application of this case by case derogation in the area of financial services. This guidance followed expressions of concern by a number of Member States regarding a full application of the Internal Market clause to financial services pending closer convergence in certain financial services areas. The Communication explains in what limited circumstances⁴⁰ a Member State which considers that consumers on its territory should be protected against a particular online financial service, may take measures against that particular incoming financial service following notification to

³⁶ I.e., 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, Art. 2(h).

³⁷ The Article 3(4)-(6) derogation.

³⁸ In a further case, the authorities of a Member State successfully took action to enforce their law transposing the Directive against a service provider established on their territory as a result of being requested to take appropriate action under national law by the authorities of another Member State. This action was taken pursuant to the co-operation obligation provided for by Article 3(4)(b), with the result that the problem was resolved without the Member State of destination needing to take any measures against the service provider.

³⁹ Communication from the Commission to the Council, the European Parliament and the European Central Bank. Application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive, COM(2003) 259 final, 14.5.2003.

⁴⁰ These circumstances are the same as for other information society services.

the Commission. However, to date there have been no notifications from Member States concerning the provision of financial services.⁴¹

4.2. Establishment and information requirements

Since Article 4(1) prohibits Member States from making the taking up and pursuit of the activity of an information society service provider subject to prior authorisation (or any other requirement having equivalent effect), no authorisation scheme exists in any of the Member States. Those Member States which had considered introducing such schemes in relation to all or some information society services refrained from doing so and in some cases abolished existing authorisation requirements. This has ensured that establishing as an information society service provider in a Member State is easy and not subject to bureaucratic hurdles.

By contrast, Article 5 ensures transparency and better information regarding a service provider's identity and place of establishment. It requires, amongst other things, that the name of the service provider, his geographic address, details permitting his rapid contact, and relevant entries in trade or similar registers, are provided. This Article has been transposed almost literally by most of the Member States and the EEA countries.

There seems to be a certain lack of awareness regarding these information requirements amongst internet operators in the EU. However, information society service providers in general responded promptly and positively when shortcomings in the fulfilment of the Directive's information requirements were pointed out to them.⁴² Member States will need to increase awareness of these requirements in order to make sure that businesses adapt their websites accordingly.

4.3. Commercial communications

The ability of a firm to advertise its services or products on the internet has several important effects: it not only provides an excellent medium for firms of any size to make themselves known and provides a major source of revenue for many information society service providers, but importantly, also constitutes an excellent source of information for consumers.

The Directive supplements existing Directives in the field of consumer protection⁴³ by, for example, adding to the transparency requirements in Community law with which online

⁴¹ In his report to the European Parliament on the Commission Communication on e-commerce and Financial services (COM(2001) 66 final, 7.2.2001), Christopher Huhne stressed the importance of a full application of the internal market clause to the area of financial services, given that area's particular suitability for cross border delivery, and also stressed the opportunities and benefits brought by the application of the Internal Market principle to e-commerce in Europe.

⁴² Results of a sampling of websites carried out by VZBV (Verbraucherzentrale Bundesverband - German association of consumer organisations) between October 2002 and February 2003, see http://www.vzbv.de/home/start/index.php?page=themen&bereichs_id=5&themen_id=20&mit_id=164&task=mit.

See also a study carried out by the European Consumer Centres, "Realities of the European online marketplace", available at http://www.iaa.ie/downloads/eec_report.pdf, with a focus on the implementation of the information requirements pursuant to Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19.

⁴³ E.g., Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1999, p. 19; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, OJ L 271, 9.10.2002, p. 16; Directive 84/450/EEC

commercial communications, including discounts, promotional offers, competitions and games, must comply. These requirements⁴⁴ provide additional protection to consumers and enhance their confidence in e-commerce. This will be further complemented by the proposed Regulation on Sales Promotions⁴⁵, the proposed Directive on Unfair Commercial Practices⁴⁶ and the proposed Regulation on Enforcement Cooperation⁴⁷; In addition, the requirement to clearly identify commercial communications set out in Article 6(a) of the Directive is similar to the one applicable to broadcasting in Article 10(1) of the Television Without Frontiers Directive⁴⁸. Virtually all Member States have transposed Article 6(a) quasi literally.⁴⁹

The Directive left open to Member States the possibility of allowing or prohibiting unsolicited commercial communications via e-mail by information society service providers established on their territory and limited itself to requiring such unsolicited commercial communications to be clearly identified.

However, unsolicited commercial communications have increasingly become a problem for consumers and business alike. Therefore, the issue of unsolicited commercial communications via e-mail has now been dealt with at Community level by Directive 2002/58/EC on Privacy and Electronic Communications⁵⁰, which allows the sending of unsolicited commercial communications via e-mail only after prior consent by the recipient, when the recipient is a natural person, or, within an established commercial relationship. The Commission has, in addition, launched work on complementary measures, in particular as regards technical and international aspects of unsolicited commercial communications.⁵¹ In the latter case, the Commission is focusing its efforts on international co-operation to fight unsolicited commercial communications, as most originate from outside the EU.

4.4. Regulated professions

The Directive obliges Member States to ensure that members of regulated professions may use commercial communications online, subject to compliance with professional rules in particular relating to the independence, honour and dignity of the profession. This means that members of regulated professions may provide information to clients via websites, which was

of 10 September 1984 concerning misleading and comparative advertising, OJ L 250, 19.9.1984, p. 17, as amended by Directive 97/55/EC of the European Parliament and of the Council, OJ L 290, 23.10.1997, p. 18; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

⁴⁴ see Articles 5 and 6.

⁴⁵ COM(2001) 546 final, 2.10.2001, amended proposal COM(2002) 585 final, 25.10.2002.

⁴⁶ COM(2003) 356 final, 18.6.2003.

⁴⁷ COM(2003) 443 final, 18.7.2003.

⁴⁸ 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 298, 17.10.1989, p. 23, amended by Directive 97/36/EC, OJ L 202, 30.7.1997, p. 60, and currently under review. http://europa.eu.int/comm/avpolicy/regul/twf/newint_en.htm.

⁴⁹ Two Member States, France and Spain, have added an obligation to mention the word "publicity" in commercial communications

⁵⁰ Directive 2002/58/EC of the European parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, p. 37. Article 7(2) of the Directive on electronic commerce, which applies to natural persons only, is now to be interpreted in the light of Directive 2002/58.

⁵¹ For more information see

http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1015/0|RAPID&lg=EN&display=.

previously not possible in a number of Member States.⁵² Legislation transposing the Directive in many Member States explicitly sets down the principle that online advertising is permitted for the regulated professions under the conditions set out at Article 8(1)⁵³.

Associations representing regulated professions at a European level have responded positively to the call launched by the Directive to develop codes of conduct relating to the use of commercial communications. The accountancy profession⁵⁴, lawyers⁵⁵, the doctors⁵⁶, pharmacists⁵⁷, and real estate agents⁵⁸ have established codes of conduct at a European level specifically designed to deal with online commercial communications. Some codes exclusively address online commercial communications, others cover a wider range of web-based services. A common thread to all codes is the emphasis on the obligation to provide accurate and truthful information and to refrain from advertising which is 'over commercial' so as to preserve the dignity and honourability of the profession.

4.5. Electronic contracting

The Directive contains three provisions on electronic contracts, the most important of which being the obligation on Member States to ensure that their legal system allows for contracts to be concluded electronically, see Article 9(1). This provision, in effect, required Member States to screen their national legislation to eliminate provisions which might hinder the electronic conclusion of contracts. Many Member States have introduced into their legislation a horizontal provision stipulating that contracts concluded by electronic means have the same legal validity as contracts concluded by more "traditional" means.⁵⁹ In particular, as regards requirements in national law according to which contracts have to be concluded "in writing", Member States' transposition legislation clearly states that electronic contracts fulfil such requirement.⁶⁰

The provisions in the Directive are complemented by Directive 1999/93 on Electronic Signatures⁶¹, which aims at ensuring the legal recognition of electronic signatures, thereby allowing for functional equivalence in the conclusion of contracts between traditional paper documentation and electronic communications. Essentially, Article 5(1) of Directive 1999/93 gives a "qualified electronic signature" attached to electronic data the same status as a hand-

⁵² For a general overview on Member States' rules on advertising by regulated professions see the study undertaken by the Institut für höhere Studien, Wien for DG Competition, "Economic impact of regulation in the field of liberal professions in different Member States", available at <http://europa.eu.int/comm/competition/publications/publications/#liberal>.

⁵³ Belgium, Greece, Ireland, Italy, Austria, and Portugal in its present draft.

⁵⁴ Model Code of Conduct Governing On-line Commercial Communications by Member Bodies of the Federation des Expert Comptables Europeens (FEE) and their members, available at <http://www.fee.be/secretariat/PDFs/Code%20of%20Conduct%20E-Commerce.pdf>.

⁵⁵ Electronic Communication and the Internet, available at http://www.ccbe.org/doc/En/e_com_en.pdf.

⁵⁶ European Good Practice Guide for publicity relating to physicians' professional practice on the Net, available at http://www.cpme.be/adopted/CPME_AD_Brd_160302_6_EN_fr.pdf.

⁵⁷ Les indications du GPUE concernant les services pharmaceutiques en ligne, available at <http://www.pgeu.org/webdata/docs/01.06.20F%20PGEU11%20code%20de%20conduit.pdf>.

⁵⁸ Code of conduct for real estate professionals in the field of e-commerce, available at <http://www.cepi.be>.

⁵⁹ Belgium, Germany, Spain, France, Luxemburg, Finland.

⁶⁰ Moreover, the Directive has brought about changes in the national interpretation of 'in-writing' requirements, for instance in Germany as regards insurance contracts and the obligation that prior information be given in writing.

⁶¹ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12.

written signature on a paper document. Article 5(2) of Directive 1999/93 provides that an electronic signature may not be denied legal effect and may not be considered inadmissible as evidence in legal proceedings solely on the ground that it is in electronic form or that it is not a "qualified" electronic signature.

Furthermore, Articles 10 and 11 of the Directive, concerning information to be provided about the electronic conclusion of contracts and the requirement to confirm receipt of an order are transposed almost literally in national legislation. Feedback from the Member States indicates that after some phasing in and initial difficulties, information society service providers quickly adapted their websites to comply with those requirements.⁶²

Three Member States have included rules in their transposition legislation dealing with the actual moment of the conclusion of a contract.⁶³ In the other Member States this issue is governed by general contract law. So far, no case law has come to the attention of the Commission indicating difficulties created by the general contract law rules in determining the moment of conclusion of an electronic contract.

4.6. Liability of internet intermediaries

Articles 12-14 establish precisely defined limitations on the liability of internet intermediaries providing services consisting of mere conduit, caching and hosting. The limitations on liability in the Directive apply to certain clearly delimited activities carried out by internet intermediaries, rather than to categories of service providers or types of information.⁶⁴ The limitations on liability provided for by the Directive are established in a horizontal manner, meaning that they cover liability, both civil and criminal, for all types of illegal activities initiated by third parties.

The Directive does not affect the liability of the person who is at the source of the content nor does it affect the liability of intermediaries in cases which are not covered by the limitations defined in the Directive. Furthermore, the Directive does not affect the possibility of a national court or administrative authority to require a service provider to terminate or prevent an infringement.⁶⁵ These questions are subject to the national law of the Member States.

The limitations on the liability of intermediaries in the Directive were considered indispensable to ensuring both the provision of basic services which safeguard the continued

⁶² A sampling of e-commerce websites taken in April 2002 in one Member State showed that already four out of five websites complied with the information requirements imposed by the national legislation although it only had been in force for two months. A sampling in another Member State between October 2002 and February 2003 revealed certain deficiencies in the information provided and in the availability of technical means to correct input errors. However, the service providers who were made aware of problems in their web appearance promptly reacted to adapt their websites to the legal requirements, see http://www.vzbv.de/home/start/index.php?page=themen&bereichs_id=5&themen_id=20&mit_id=164&task=mit.

⁶³ France, Luxemburg and Portugal (the latter clarifying that the acknowledgement of receipt does not necessarily determine the moment of conclusion of the contract).

⁶⁴ In particular, the limitation on liability for hosting in Article 14 covers different scenarios in which third party content is stored, apart from the hosting of web-sites, for example, also bulletin boards or 'chat-rooms'.

⁶⁵ Nevertheless, a scenario in which large scale use is made of injunctions as part of a general policy to fight against illegal content rather than being used against a specific infringement, may raise certain concerns. For example, in 2002, the authorities of North Rhine-Westphalia ordered around 90 internet access providers to block access to a number of specified sites.

free flow of information in the network and the provision of a framework which allows the internet and e-commerce to develop. Different approaches in the legislation and case law emerging from Member States and the resulting legal uncertainty for cross-border activities gave rise to the risk of obstacles to the free provision of cross-border services. However, Community-level action was limited to what was deemed necessary to prevent such a risk materialising.⁶⁶

Articles 12-14 provide, in a harmonised manner, for situations in which the intermediaries mentioned in these Articles cannot be held liable and Member States may not create additional conditions to be satisfied before an intermediary service provider can benefit from a limitation on liability. It appears that the Member States have, in general, transposed Articles 12-14 correctly. Many Member States opted to transpose Articles 12-14 quasi literally.⁶⁷

In addition to the matters dealt with by Articles 12-14, some Member States⁶⁸ decided to provide for limitations on the liability of providers of hyperlinks and search engines.⁶⁹ This was motivated by the wish to create incentives for investment and innovation and enhance the development of e-commerce by providing additional legal clarity for service providers. Whilst it was not considered necessary to cover hyperlinks and search engines in the Directive, the Commission has encouraged Member States to further develop legal security for internet intermediaries. It is encouraging that recent case-law in the Member States recognizes the importance of linking and search engines to the functioning of the internet. In general, this case-law appears to be in line with the Internal Market objective to ensure the provision of basic intermediary services, which promotes the development of the internet and e-commerce. Consequently, this case-law does not appear to give rise to any Internal Market concerns⁷⁰.

In a few cases⁷¹ national courts have already interpreted the Directive. However, in these cases, the national implementing measures of the Directive had not yet been adopted in the States concerned.

There is still very little practical experience on the application of Articles 12-14, but the feedback received so far from the Member States and interested parties has, in general, been positive. The approach taken in the Directive appears to have wide reaching support among stakeholders. In any case the Commission will, in accordance with Article 21, continue to

⁶⁶ These conclusions were based on careful analysis of existing rules and emerging case law, including a study on "Existing rules in Member States governing liability for information society services" commissioned by the Commission from Deloitte & Touche in 1998.

⁶⁷ So far, the Commission services have identified, on a preliminary basis, 1-2 cases, in which the Member States appear not to have implemented correctly the limitations on liability, but the analysis of these cases continues.

⁶⁸ Spain, Austria and EEA-State Liechtenstein and Portugal in its draft law.

⁶⁹ Spain and Portugal have opted for the model of Article 14 both for search engines and hyperlinks, whereas Austria and Liechtenstein have opted for the model of Article 12 for search engines and of Article 14 for hyperlinks.

⁷⁰ For example in France TGI Paris, référé, 12 mai 2003, Lorie c/M. G.S. et SA Wanadoo Portails, in Germany in the case Verlagsgruppe Handelsblatt v. Paperboy, aus dem Bundesgerichtshof (BGH), Urteil vom 17. Juli 2003 – I ZR 259/00.

⁷¹ Cases Deutsche Bahn v. XS4ALL, judgement by Gerechtshof te Amsterdam (Court of Appeals), 762/02 SKG, of 7.11.2002, and Deutsche Bahn v. Indymedia, judgement by Rechtbank Amsterdam (District Court), KG 02/1073, of 20.6.2002, in the Netherlands (judgements available at <http://www.rechtspraak.nl>); and Case Public Prosecutor v. Tele2 in the EEA-country Norway, judgement by Borgarting Lagmannsrett (Court of Appeals), 02-02539 M/01, of 27.6.2003. Tele2 was acquitted when the public prosecutor dropped charges against it.

monitor and rigorously analyse any new developments, including national legislation, case-law and administrative practices related to intermediary liability and will examine any future need to adapt the present framework in the light of these developments, for instance the need of additional limitations on liability for other activities such as the provision of hyperlinks and search engines.⁷²

Article 15 prevents Member States from imposing on internet intermediaries, with respect to activities covered by Articles 12-14, a general obligation to monitor the information which they transmit or store or a general obligation to actively seek out facts or circumstances indicating illegal activities. This is important, as general monitoring of millions of sites and web pages would, in practical terms, be impossible and would result in disproportionate burdens on intermediaries and higher costs of access to basic services for users.⁷³ However, Article 15 does not prevent public authorities in the Member States from imposing a monitoring obligation in a specific, clearly defined individual case.

4.7. Notice and take down procedures

The conditions under which a hosting provider is exempted from liability, as set out at Article 14(1)(b) constitute the basis for the development of notice and take down procedures for illegal and harmful information⁷⁴ by stake-holders. Article 14 applies horizontally to all types of information. At the time when the Directive was adopted, it was decided that notice and take down procedures should not be regulated in the Directive itself. Instead Article 16 and Recital 40 expressly encourage self-regulation in this field.⁷⁵

This approach has also been followed by the Member States in their national laws transposing the Directive. Out of those Member States which have transposed the Directive, only Finland has included a legal provision setting out a notice and take down procedure concerning copyright infringements only.⁷⁶ All the other Member States have left this issue to self-regulation⁷⁷.

⁷² The approach of the Member States who opted to legislate on the hyperlinks and search engines does not seem to give rise to a risk of fragmentation of the Internal Market. The Commission is, however, actively following work in Member States relating to liability issues such as the fundamental work carried out by "Le Forum des droits sur l'Internet" in France, which has published recommendations on hyperlinks called "Hyperliens: Statut Juridique", published 3.3.2003, and "Quelle responsabilité pour les créateurs d'hyperliens vers des contenus illicites", published 23.10.2003, both available at <http://www.foruminternet.org/recommandations/>.

⁷³ In this context, it is important to note that the reports and studies on the effectiveness of blocking and filtering applications appear to indicate that there is not yet any technology which could not be circumvented and provide full effectiveness in blocking or filtering illegal and harmful information whilst at the same time avoiding blocking entirely legal information resulting in violations of freedom of speech.

⁷⁴ Mechanisms run by interested parties aimed at identifying illegal information hosted on the network and at facilitating its rapid removal.

⁷⁵ The European Parliament, when adopting the Directive in 2000, invited the Commission to encourage the establishment of efficient notice and take down procedures by interested parties. European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council Directive on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market, 4.5.2000, OJ C 041, 7.2.2001, p. 38.

⁷⁶ Amongst the EEA countries, Iceland has also set out a statutory notice and take down procedure.

⁷⁷ Belgium has set up a horizontal co-regulatory procedure: Cooperation Protocol between the Belgian administration and the Belgian Association of internet Service Providers, <http://www.ispa.be/en/c040201.html>

In accordance with Article 21(2), which requires the Commission to analyse the need for proposals concerning notice and take down procedures, the Commission has actively encouraged stakeholders to develop notice and take down procedures and has systematically collected and analysed information about emerging procedures.⁷⁸ The Commission has participated in European and international fora where notice and take down procedures have been discussed: in particular, in the Global Business Dialogue⁷⁹, in the workshops organised by the European Parliamentarians Internet Group (e-Ping)⁸⁰, and in the Rights Watch Project⁸¹. It has also encouraged Member States to actively work with stakeholders and has cooperated with the Spanish presidency, which held discussions with Member States in the information society working group of the Council.

The Council Recommendation on the protection of minors and human dignity⁸² adopted in 1998 is the first legal instrument at EU level concerning the content of audiovisual and information services made available on the internet. The Recommendation offers guidelines for the development of national self-regulation regarding the protection of minors and human dignity. In particular, it requests internet service providers to develop codes of good conduct so as to better apply current legislation.⁸³

The Commission has also been working, in the context of its Safer Internet Action Plan, to combat illegal and harmful content on global networks.⁸⁴ Directive 2001/29/EC on copyright

⁷⁸ Different procedures have been analysed and several companies and organisations have been consulted in the Member States, e.g., the Complainants Bureau for Discrimination on the Internet in the Netherlands; XS4ALL (The Netherlands); Telefónica (Spain); Nokia (Finland); Telia (Sweden), BT online (UK); Internet Watch Foundation (UK); eBay; The European Internet Services Association (Euroispa); The European Federation for the Interactive Software Industry; and the Motion Pictures Association of America.

⁷⁹ Work in the Global Business Dialogue (GBDe) has been followed closely by the Commission through contact with the principal companies involved. The GBDe issued a Recommendation in September 2000 on a specific model for a notice and take down procedure for intellectual property rights. With the encouragement of the Commission the GBDe created in 2002 a task force on Combating Harmful Internet Content with the purpose of addressing notice and take down for other harmful content. This task force issued a Recommendation on October 2002 containing suggestions address to internet intermediaries and to the public authorities on how to develop "processes for dealing with harmful content in the internet", <http://www.gbde.org>.

⁸⁰ [Http://www.eping.org](http://www.eping.org).

⁸¹ The Rights Watch Project is a research project financed by the Commission through its 5th Framework Program for Research. The project was created in order to set up a fully functioning pilot that would facilitate a pan European self regulatory procedure for the removal of material infringing intellectual property rights. It has been the only initiative so far at European level on notice and take-down. Representatives from the Commission have been present all along the negotiations of the project and, in particular, by participating in the two fora that the project has held, where internet service providers, right holders and users associations were represented, <http://www.rightswatch.com>.

⁸² Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (98/560/EC), OJ L 270, 7.10.1998, p. 48.

⁸³ The implementation of the Recommendation was evaluated for the first time in 2000/2001. The report on the application of this Recommendation published in 2001 (COM(2001)106 final) showed that the application of the Recommendation was already then overall quite satisfactory. The Commission is working on a second report on the implementation of the Recommendation, whose adoption is foreseen at the end of 2003 on the basis of a questionnaire, which was sent to both the Member States and the acceding States. The objective of the new report is to establish what progress has been made in comparison to the situation in 2000, when the data was collected for the first application report.

⁸⁴ Safer Internet Action Plan, OJ L 33, 6.2.1999, p. 1, and its follow-up , Decision No 1151/2003/EC of 16 June 2003, OJ L 162, 1.7.2003, p.1.

and related rights⁸⁵ requires Member States to ensure that rightholders are in a position to apply for injunctions, under certain conditions, against intermediaries whose services are used by a third party to infringe a copyright or related right. The Commission also presented a proposal on the enforcement of intellectual property rights, which, amongst other issues, provides for appropriate remedies with respect to internet-related infringements of intellectual property, including injunctive relief.⁸⁶

Intermediary service providers have, themselves, in cooperation with national authorities as well as with other stakeholders, such as IP rightholders, been active in fighting against illegal activity on the internet, whilst also seeking to ensure a balance between the legitimate interests of users, other interested parties, and the freedom of speech. In this regard, intermediary service providers have been instrumental in the production of national codes of conduct for internet service providers⁸⁷, some of which have also been notified to the Commission⁸⁸.

Analysis of work on notice and take down procedures shows that though a consensus is still some way off, agreement would appear to have been reached among stake holders as regards the essential elements which should be taken into consideration. Although some further work among stake holders seems to be necessary to clarify a number of outstanding issues, the Commission at this stage does not see any need for a legislative initiative.

4.8. Codes of conduct and out-of-court dispute settlement

The Directive calls on trade, professional, and consumer associations to contribute to developing a reliable and flexible framework for e-commerce by drawing up codes of conduct. Very often such codes are associated with what are termed 'trustmark schemes' or 'labels'.⁸⁹ Several associations have established sector specific codes and trustmark schemes at European level⁹⁰ and many more codes exist at a national level⁹¹. However, it appears that

⁸⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10

⁸⁶ Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, COM(2003) 46 final, 30.1.2003. Article 2 of the proposed Directive states that it shall not affect Directive 2000/31/EC.

⁸⁷ EuroISPA's members' codes of conduct, available at <http://www.euroispa.org>.

⁸⁸ For example the Code of Practice and Ethics by the Internet Service Providers Association of Ireland, <http://www.ispai.ie>.

⁸⁹ BEUC, the European Consumer Organisation, and UNICE, the European Industry and Employer's association, reached an agreement on principles for such trustmark schemes which takes up many of the requirements set out in the Directive and deals with codes of conduct regarding information to be provided, procedures for placing of orders, and the like. The agreement can be found at: <http://212.3.246.118/1/PEDMMGECEFLNDAPDCIBCDIKLPDBY9DAWW69LTE4Q/UNICE/docs/DLS/2002-03813-E.pdf>.

The European Commission had initiated and financed work to develop a horizontal European trustmark scheme incorporating a code of conduct, called "Webtrader", a project co-financed by DG Enterprise from 2000 until February 2003, see <http://europa.eu.int/comm/enterprise/ict/policy/webtrader.htm>. However, no agreement on a horizontal, cross-sectorial code could be reached between the participants. E.g., for the insurance sector: <http://www.cea.assur.org/cea/publ/download/article149.pdf>; for direct marketing: http://www.fedma.org/img/db/Code_of_conduct_for_e-commerce.pdf; and for e-commerce retailers: <http://www.euro-label.com/euro-label/ControllerServlet>.

⁹¹ E.g., "Chamber-Trust + Web-Trader" in Belgium (<http://194.78.225.199/fr/index.html>); "TrustedShops" in Germany (<http://www.trustedshops.de/de/home>); "l@belsite" in France (<http://www.labelsite.org>); "e-commerce Gütezeichen" in Austria (<http://www.guetezeichen.at>); "bbbonline" in the UK (<http://www.bbbonline.org>).

after an initial boom in the establishment of trustmarks and labels immediately following adoption of the Directive in 2000 and 2001, activity in this area slowed down.⁹² The Commission therefore appeals to business and consumer organisations as well as to Member States to continue to actively support and promote initiatives in this area.

In B2B e-commerce, the Commission has already established an expert group to promote the elaboration of codes of conduct in B2B internet trading platforms. The expert group has prepared a report with a checklist for the assessment of such codes.⁹³

The increase in opportunities and geographical reach brought about by e-commerce also gives rise to a risk of cross border disputes between trading partners. It is in such cases crucial that access to rapid and flexible out-of-court dispute resolution schemes exists. For this reason, the Directive both obliges Member States to allow for the development of out-of-court dispute settlement mechanisms by electronic means and encourages the development of such schemes. In recent years a wealth of out of court dispute resolution initiatives, often in connection with codes of conduct, has appeared.⁹⁴ The Commission has supported the development of such schemes and continues to do so.⁹⁵

4.9. National e-commerce contact points

Pursuant to Article 19, since transposition of the Directive the Commission has worked actively together with the Member States to ensure the setting up of national contact points for e-commerce. These contact points will improve the cooperation between the Member States (Article 19(2) regarding contact points for cooperation between the Member States) and ensure that consumers and business have access to general information on e-commerce issues relevant to the application of the Directive and details of authorities and other bodies providing further information and assistance, (Article 19(4) regarding contact points for consumers and business). A list of these contact points and contact details are available on the e-commerce website of the Internal Market Directorate General.⁹⁶

⁹² This might also be a direct consequence of the general downturn in the e-economy.

⁹³ Report of the Expert Group on B2B Internet trading platforms. Final Report (<http://europa.eu.int/comm/enterprise/ict/policy/b2b/wshop/fin-report.pdf>). To further promote the work of the expert group, the Commission will prepare a Communication on fair trade in B2B.

⁹⁴ See, e.g., the overview by the Centre for Socio-Legal Studies at Oxford University, established with funding from the European Commission under the Internet Action Plan at <http://www.selfregulation.info/cocon/coc-reviss03-dwc-020510.htm>. See also more generally on ADR the Commission's Green paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final, 19.4.2002, at http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf.

⁹⁵ ECODIR, for instance, is a pilot project carried out by a consortium of university partners and financed by the Commission. Until June 2003 it has provided an easily accessible online system for the resolution of disputes between consumers and e-commerce businesses. It is now in the process of being evaluated with a view to its continuation. See http://www.ecodir.org/about_us/index.htm. The IST project (IST-2000-25464) "E-Arbitration" (Electronic Arbitration Tribunal) provides an alternative dispute resolution system for SMEs. It defines the technological requirements, the necessary infrastructure and the regulatory framework for establishing and coordinating an internationally distributed Arbitration Tribunal using networked computers and intelligent multi-agent systems as their primary means of communication. Project URL: <http://www.e-global.es/arbitration/>

With the initiatives EEJ NET and FIN-Net, although not limited to e-commerce, the Commission, together with Member States, has established out-of-court complaints networks to help business and consumers resolve disputes in the Internal Market quickly and efficiently. More information can be found at EEJ-Net's website <http://www.eejnet.org> and at FIN-Net's website <http://finnet.jrc.it>.

⁹⁶ http://europa.eu.int/comm/internal_market/en/ecommerce/index.htm.

5. INTERNATIONAL ASPECTS

5.1. International developments in e-commerce

Due to the very nature of e-commerce and the internet, which do not recognise national frontiers, there is an obvious need for the development of some framework at international level. In this context some of the solutions adopted in the Directive, such as the limitations on liability for internet intermediaries, can serve as a model. The Commission has actively worked to raise awareness of the EU's approach and feedback received has been very positive.⁹⁷

The economic downturn experienced in recent years in the area of e-commerce and the "new economy" has obviously had repercussions on a global scale and led to a stagnation in discussions. With the recent recovery of e-commerce a revived interest in international dialogue and cooperation can be expected. The Commission will continue and, where possible, increase its involvement in various multilateral and bilateral fora and will work towards a global e-business friendly environment.

Among the international fora in which the Commission is present are the World Trade Organization's work programme on e-commerce⁹⁸, the Organisation for Economic Co-operation and Development's (OECD) work on broadband issues and consumer protection in cross-border commerce, particularly as regards the internet⁹⁹, the Council of Europe's work on information and cooperation on information society issues¹⁰⁰, as well as its work on cybercrime, impact of the new technologies on human rights, conditional access services, and data protection¹⁰¹, the G8's work on safety and security on the internet and the World Intellectual Property Organisation's (WIPO) work on the protection of intellectual property rights on the internet¹⁰². Work on electronic contracts is furthermore carried out by the United Nations Commission on International Trade Law (UNCITRAL)¹⁰³. Moreover, the

⁹⁷ An example of successful "model character" of the Directive is the South African Electronic Communications and Transactions Act 25 of 2002, which closely follows the Directive as regards intermediary liability (Articles 12-15), Government Gazette of the Republic of South Africa, Vol. 446, Cape Town, 2 August 2002, No. 23708.

⁹⁸ In 1998, the WTO had already developed a Work Programme on Electronic Commerce (available at http://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm), although the follow-up to the Programme did not fulfil all the expectations it had raised. At present, specific e-commerce issues are discussed at 'dedicated meetings' of the General Council, focusing on the question of how to classify electronic deliveries. The European Commission along with the EU Member States and many other WTO members promotes the view that electronic deliveries constitute services and thus come under the existing GATS regime.

⁹⁹ See <http://www.oecd.org>, topic "Electronic commerce".

¹⁰⁰ On 4.10.2001 the Council of Europe adopted the Convention 180 on information and legal cooperation on Information Society services, modelled on Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ L 217, 5.8.1998, p. 18, its definition of information society services being exactly the one provided in the Directive. The Commission has formally proposed to the EU Council to adhere to the Convention on behalf of the EU, COM(2003) 398 final, 7.7.2003.

¹⁰¹ See <http://www.coe.int>, of particular interest is the Convention on Cybercrime, ETS no. 185, which is available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>.

¹⁰² See <http://ecommerce.wipo.int/primer/index.html>.

¹⁰³ See <http://www.uncitral.org>. UNCITRAL has already done fundamental work in e-commerce by adopting, in 1996, a Model Law on Electronic Commerce with Guide to Enactment and in 2001 a Model Law on Electronic Signatures, which are frequently referred to in international contexts.

Commission is actively involved in cooperation in the context of the Asia-Europe Meeting¹⁰⁴ Trade Facilitation Action Plan on e-commerce¹⁰⁵. This involves recommendations on e-commerce regulation adopted in September 2002.¹⁰⁶

The importance of non-governmental fora such as the Global Business Dialogue in e-commerce (GBDe), Transatlantic Consumer Dialogue (TACD), and Transatlantic Business Dialogue (TABD) in e-commerce should not be underestimated.¹⁰⁷ These fora issue recommendations to governments and develop standards for business on issues such as intermediary liability (GBDe¹⁰⁸), consumer protection in e-commerce (TACD¹⁰⁹) and digital trade (TABD¹¹⁰). Such initiatives are of particular importance in the quickly evolving and innovative area of e-commerce as they can address the latest developments with greater rapidity and flexibility than governmental fora.

Finally, the Commission is involved in a number of bilateral regulatory dialogues on e-commerce related to information society issues, in order to promote the Directive's regulatory approach and to work towards consistency at international level. These bilateral dialogues include the EU/US Information Society Dialogue, the cooperation with Canada in the context of Canada-EU Trade and Investment Sub-Committee (TISC), including an e-commerce work plan in 1999, the EU-Japan dialogue, the EU-Mercosur regulatory dialogue and the dialogue with the Mediterranean countries.

5.2. Enlargement

A number of accession countries have already transposed the Directive¹¹¹, although in some cases only partially. Out of the three¹¹² candidate countries only Romania has transposed the Directive. The Commission is actively working with the remaining countries to ensure transposition in due course.

6. EVALUATING THE BENEFITS OF THE DIRECTIVE

Given the lack of experience with the Directive it is difficult to evaluate its impact. When doing so, it is important to note that information society services are not limited to the mere buying and selling of products and services online. They also comprise online commercial communications, online information and entertainment, provision of internet access services, e-mail, search engines, etc. So far, the only complaints which the Commission services have received from companies engaged in cross-border online activities concern matters excluded from the scope of application of the Directive or from the application of the Internal Market clause, such as online gambling¹¹³. This seems to indicate that the Directive has otherwise

¹⁰⁴ Grouping the EU and 10 Asian ASEM countries.

¹⁰⁵ <http://www.ktm.fi/eng/news/asem2002ecom/>.

¹⁰⁶ <http://www.congrex.fi/asem2002ecom/>

¹⁰⁷ <http://www.gbde.org>, <http://www.tacd.org>, and <http://www.tabd.org>.

¹⁰⁸ Paris recommendation on liability, 13.9.1999, Miami Model IPR-specific notice and take down procedure, 26.10.2000.

¹⁰⁹ In particular doc. no ECOM-27-02 "Resolution on children and e-commerce" and doc no. Internet-20-02 "Resolution on protecting consumers from fraud and serious deception across borders".

¹¹⁰ Report of the TABD meeting in Chicago in 2002, <http://www.tabd.org/recommendations/Chicago02.pdf>.

¹¹¹ Lithuania, Hungary, Malta, Poland, Slovenia.

¹¹² Bulgaria, Romania, Turkey.

¹¹³ Service providers established in one Member State offering online sports betting are required by other Member States to bar access by their citizen's to those online services.

succeeded in providing an adequate legal framework for information society services in the Internal Market.

The Directive appears to have been successful in reducing court proceedings and hence legal uncertainty, in particular as regards liability of internet intermediaries. Emerging disparities in Member States' case-law was one of the driving forces, which lead the Commission to propose the Directive. After the adoption of the Directive, no such case-law has come to the attention of the Commission. Together with the guarantee that internet intermediaries should not be subject to burdensome and costly monitoring obligations, this seems to have contributed to ensuring low-cost provision of basic intermediary services.

When evaluating the effects of the Directive, there are certain indicators which are of particular interest and which have not yet been used in the present measurements of internet usage and online activities, which are often wrongly limited to online sales. For instance, the percentage of internet users searching for online information prior to offline sales, the number of cross-border online information searches as a percentage of total online information searches, productivity gains resulting from lower information search costs in the B2B field, and expenditure by enterprises on online advertising.

The completion of the transposition of the Directive in all the Member States is expected by the end of 2003, two years after the deadline of January 2002 set in the Directive. This will allow evaluation of the impact of the Directive in more detail, in line with the above-mentioned indicators in the second report on the application of the Directive due in 2005.

7. ACTION PLAN FOR THE FOLLOW-UP OF THE DIRECTIVE

7.1. Ensure the correct application of the Directive

The Commission will continue to closely monitor application of the Directive in the Member States, including follow-up and analysis of any relevant case-law, administrative decisions and complaints from citizens and business. Bilateral contacts, which were successfully used during the transposition of the Directive, will be maintained with the Member States, including Accession and Candidate Countries, to address specific problems and ensure continuous exchange of information. The notification procedure pursuant to Directive 98/34/EC¹¹⁴, which was instrumental in ensuring the correct and consistent transposition of the Directive, will be an important tool in ensuring coherence between the Directive and new national legislative initiatives which affect information society services.

7.2. Enhance administrative cooperation between Member States

After assisting in the setting-up of contact points for administrative cooperation between the Member States, the Commission will focus on ensuring the practical functioning of administrative cooperation and the continuous exchange of information between both the Commission and the Member States and between the Member States themselves.

¹¹⁴ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ L 217, 5.8.1998, p. 18.

7.3. Raise information and awareness with business and citizens

After ensuring that Member States have nominated contact points for business and citizens pursuant to Article 19(4), the Commission will focus on enhancing close links and a continuous flow of information between national contact points and business and citizens, in particular, including information on administrative and judicial decisions and cases of out of court dispute resolution. In this context, special attention will be given to the correct application of the information requirements provided by the Directive and to the dissemination of information concerning applicable codes of conduct and their enforcement.

The Commission is already funding the establishment and operation of an online information system, managed by a European network of Euro Info Centres, to raise awareness among SME's on the legal aspects of e-business and to collect feedback on the practical problems enterprises are facing when doing business electronically (ELEAS project).¹¹⁵ This information system will be extended to the Accession and Candidate countries and will become operational in early 2004.

7.4. Monitor policy developments and identify areas for additional action

In a number of Member States new regulatory initiatives are under way in areas such as online gambling, including online sports betting, e-pharmacies, or the protection of minors. This gives rise to the risk of regulatory fragmentation and/or distortions of competition. The Commission will closely monitor these policy developments in order to identify possible needs for Community action, which will be considered in the second report on the Directive in 2005.

As far as online gambling is concerned, which is currently outside of the scope of the Directive and, in relation to which, the Commission has received a number of complaints concerning cross-border activities¹¹⁶, the Commission will initiate the appropriate action to deal with these complaints and, in addition, launch a study to provide the information required to examine the need for and scope of a possible new Community initiative. Furthermore, with respect to insurance, which is currently outside of the scope of the Internal Market clause of the Directive, the Commission has launched work with Member States and interested parties in order to explore possible ways of bringing certain insurance activities in line with the Internal Market clause.

The Commission continues to monitor closely technological developments relevant to information society services in order to ensure that the regulatory framework provides the best possible environment for further development of e-commerce.

7.5. Strengthen international cooperation and regulatory dialogue

Given the cross-border nature of e-commerce and the resulting need for international solutions, the Commission will strengthen its regulatory dialogue with major trading partners and its presence in international fora. Particular attention will be given to the creation of coherent rules at international level on subjects such as liability of internet intermediaries,

¹¹⁵ <http://ebusinesslex.net>

¹¹⁶ Regarding Denmark, Germany, Italy, and the Netherlands, where authorities demanded online gambling service providers from other Member States to block access to their websites for citizens living in those states.

including notice and take down procedures for illegal content, electronic contracts, information requirements, and the promotion of out of court dispute resolution.

8. CONCLUSIONS

With the new legal framework for e-commerce created by the Directive being in the process of being put into place in all Member States, it is now necessary to collect information and gain experience on how the new framework works in practice.

To this end, the Commission has launched an open consultation on legal problems in e-business with a view to collecting feedback and practical experience from the market and to identifying remaining practical barriers or new legal problems encountered by enterprises when doing e-business.¹¹⁷

The analysis to date has not shown a need to adapt the Directive as yet and, given the lack of practical experience, a revision of the Directive would in any event be premature. However, e-commerce is a quickly evolving area, in which legal, technical, and economic developments need to be constantly monitored and analysed.

This report is a first stage in a continuous process to ensure that Europe stays in the frontline of development and provides the best possible environment for e-commerce with a maximum level of legal certainty both for business and consumers whilst ensuring a minimum of burdens for business and Member States.

The Commission trusts that this report will be of assistance to Member States in ensuring the correct application of the Directive and to citizens and business in informing them of the opportunities and safeguards provided by the new legal framework. The Commission welcomes feedback on the findings of this report in view of its task of ensuring continuous monitoring of the application of the Directive.¹¹⁸

The results of the Action Plan in this report will be made public. It will form the basis for the second report on the application of the Directive due in 2005, which will also address possible needs for adaptation of the Directive.

¹¹⁷ http://europe.eu.int/yourvoice/consultations/index_en.htm. The consultation was open until 10 November 2003. The Commission services will analyse the results of the consultation in a Commission staff working document by January/February 2004 and will discuss them with all relevant stakeholders at a high-level conference to be organised in April 2004, as foreseen in the e-Europe 2005 Action Plan.

¹¹⁸ http://europa.eu.int/comm/internal_market/en/ecommerce/index.htm.

ANNEX

TRANSPOSITION OF DIRECTIVE 2000/31/EC

1. Member States:

Belgique/ België	Loi sur certains aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution – 11 mars 2003/Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij als bedoeld in artikel 77 van de Grondwet – 11 maart 2003 Loi sur certains aspects juridiques des services de la société de l'information – 11 mars 2003/Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij – 11 maart 2003 Moniteur belge du 17.3.2003 p. 12960 et 12963. http://www.moniteur.be/index_fr.htm http://www.moniteur.be/index_nl.htm
Danmark	Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel; LOV nr 227 af 22/04/2002 (Gældende) http://www.retsinfo.dk/_GETDOC_/ACCN/A20020022730-REGL
Deutschland	Gezetz über rechtliche Rahmenbedingungen für den Elektronischen Geschäftsverkehr (Elektronischer Geschäftsverkehr-Gesetz (EGG)) Bundesgesetzblatt (BGBl) 2001 Teil I Nr. 70 vom 20. Dezember 2001, S. 3721 http://www.iid.de/iukdg/EGG/index.html Mediendienste-Staatsvertrag in der Fassung des sechsten Rundfunkänderungsstaatsvertrags in Kraft seit 1. Juli 2002, u.a. im Gesetz- und Verordnungsblatt für das Land Rheinland-Pfalz vom 12. Juni 2002, S. 255
Ελλάδα	ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ'ΑΡΙΘ. 131 Προσαρμογή στην Οδηγία 2000/31 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου σχετικά με ορισμένες νομικές πτυχές των υπηρεσιών της κοινωνίας της πληροφορίας, ιδίως του ηλεκτρονικού εμπορίου, στην εσωτερική αγορά. (Οδηγία για το ηλεκτρονικό εμπόριο). Αρ. Φύλλου 116, 16 Μαΐου 2003, σελ. 1747 [Presidential Decree n°. 131 transposing Directive 2000/31 of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)] Official Journal n° 116 of 16 May 2003, p. 1747]

España	Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico BOE n° 166, 12.7.2002, p. 25388 http://www.setsi.mcyt.es
France	Transposition not yet completed. Draft law notified to the Commission under the Transparency Directive (Directive 98/34). Notification n° 2003/0127 available on the Commission's web-site http://www.europa.eu.int/comm/enterprise/tris
Ireland	European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68/2003 of 24.2.2003) http://www.entemp.ie/ecd/ebusinfo.htm
Italia	Decreto legislativo 9/04/2003, n. 70 Supplemento ordinario alla Gazzetta Ufficiale della Repubblica Italiana – Serie Generale – n. 87 del 14/04/2003 http://www.senato.it/parlam/leggi/deleghe/03070dl.htm
Luxembourg	Loi du 14 août 2000 relative au commerce électronique modifiant le code civil, le nouveau code de procédure civile, le code de commerce, le code pénal et transposant la directive 1999/93 relative à un cadre communautaire pour les signatures électroniques, la directive relative à certains aspects juridiques des services de la société de l'information, certaines dispositions de la directive 97/7/CEE concernant la vente à distance des biens et des services autres que les services financiers Memorial, Journal Officiel du Grand-Duché de Luxembourg, A – N° 96 du 8 septembre 2000, p. 2176 http://www.etat.lu/memorial/memorial/a/2000/a0960809.pdf
Nederland	Transposition not yet completed.
Österreich	152. Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt (E-Commerce-Gesetz – ECG) und das Signaturgesetz sowie die Zivilprozessordnung geändert werden Bundesgesetzblatt 2001 vom 21. Dezember 2001, Teil I S. 1977. http://bgbl.wzo.at

Portugal	Transposition not yet completed. Draft law notified to the Commission under the Transparency Directive (Directive 98/34). Notification n° 2003/0134 available on the Commission's web-site http://www.europa.eu.int/comm/enterprise/tris
Suomi/Finland	Laki N:o 458 tietoyhteiskunnan palvelujen tarjoamisesta, 5.6.2002. Suomen Säädöskokoelma N:o 458, 11.6.2002, p. 3039. http://www.finlex.fi/pdf/sk/02/vihko072.pdf In addition, Finland amended three other acts as part of the transposition. These (Suomen Säädöskokoelma Nos. 459-61) are also available via the enclosed link.
Sverige	Lag om elektronisk handel och andra informationssamhällets tjänster av den 6 juni 2002; SFS 2002:562 av den 14 juni 2002 Electronic version accessible via http://www.regeringen.se, but a direct link is not available.
United Kingdom	The Electronic Commerce (EC Directive) Regulations 2002 SI n° 2013 of 21.8.2002 http://www.legislation.hmso.gov.uk/si/si2002/20022013.htm For separate implementation in financial services sector: http://www.hm-treasury.gov.uk/Documents/Financial_Services/Regulating_Financial_Services/fin_rsf_edirec.cfm?

2. Countries belonging to the European Economic Area:

Island	Lög um rafræn viðskipti og aðra rafræna þjónustu 2002 nr. 30 16. apríl. Lagasafn. Uppfært til október 2002. Útgáfa 127B. Prenta í tveimur dálkum. (Act No 30/2002 on Electronic Commerce and other Electronic Service) http://www.althingi.is/lagas/127b/2002030.html
Liechtenstein	Gesetz vom 16. April 2003 über den elektronischen Geschäftsverkehr (E-Commerce-Gesetz; ECG) Liechtensteinisches Landesgesetzblatt 2003, Nr. 133 am 12. Juni 2003
Norge	Lov 2003-05-23 nr 35: Lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven) Publisert: I 2003 hefte 7. http://www.lovdata.no/all/hl-20030523-035.html