International Journal of Communications Law and Policy

Issue 4, Winter 1999/2000

ELECTRONIC COMMERCE WITHOUT FRONTIERS?

AN OVERVIEW OVER THE EC COMMISSION'S PROPOSAL OF A E-COMMERCE DIRECTIVE AND ITS IMPLECATIONS ON THE FUTURE DEVELOPMENT OF ELECTRONIC TRADE WITHIN THE GERMAN LEGAL FRAMEWORK

by

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1. Introduction

On 7 December the Council of Ministers reached a political agreement on a common position for the proposed Electronic Commerce Directive. At the beginning of September 1999, just 10 months after the publication of the "Proposal for directive by the European Parliament and the Council on certain legal aspects of electronic trade in the internal market"[1], the Commission decided on a modified outline for a directive on e-commerce. This was the European Commission's reaction to the suggestions for change announced by the European Parliament at the beginning of May 1999. The aim of the directive is to bring down barriers to information society services within the internal market as well as allowing citizens and companies to exploit the full potential of electronic trade. The proposed Directive would establish specific harmonised rules only in those areas strictly necessary to ensure that businesses and citizens could supply and receive Information Society services throughout the EU, irrespective of frontiers. With this directive, the Commission also aims to increase the competitiveness of the European economy on an international scale. This article provides an overview of the most important regulations as well as changes versus the first version of the proposal in view of the possible effects that these directive may have on the future development of electronic trade, especially in the context of the German legal framework.

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1 COM (1998) 586 final dated 18.11.1998, OJ C 30 from 5.2.1999, p. 4

2. Background

The Commission announced that a directive were being drafted as early as March 16th 1997 in its statement entitled, "A European initiative in electronic commerce[2]". The aim of this, namely the creation of a secure legal framework allowing the advantages of e-commerce to be exploited in Europe, was already clearly defined in this statement. The advantages of e-commerce are a result of the combined effect of rapid developments in communications and information technology, the liberalisation of the telecommunications market and the launch of the Euro on the internal market. In contrast to other drafts for directives, which are usually preceded by a "Green Paper," there were no such preparatory written remarks before the first draft of the e-commerce directive. The first draft is based on principles in the so-called "Transparency directive"[3] and the directive on legal protection of services based on, or consisting of, conditional access[4]. There is also a link to the directive for electronic signatures.

On May 6th 1999 the parliament decided to adopt a position of the legal council and approved the Commission's proposal[5] subject to the modifications suggested by the Parliament and requested that the Commission amend the draft. The suggested changes were mostly of a technical nature and were largely accepted fully or in part by the Commission.

3. Setting a goal

The Commission is seeking to establish that electronic trade can develop to the benefit of the internal market, as in recital 4a of the modified proposal for directive. The cross-border character of the Internet and online services is the perfect reflection of the principle behind the internal market, namely "area without internal frontiers"[6].

The uncertainty as to which national regulations apply as far as e-commerce is concerned as well as the national differences between regulation impede cross-border electronic trade. One

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2 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: A European Initiative in Electronic Commerce, COM (97) 157 dated 16.04.1997

3 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204 , 21.07.1998 p.37-48

4 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ L 320 , 28.11.1998 p. 54-57

5 EP Report (A4-0248/99) dated 6.5.1999

6 Art. 14 Para. 2 of the Consilidated Version of the Treaty establishing the European Community

of the goals of this proposal is to remove impediments and grey areas which complicate the use of online services. This guideline should create a clearer, more unified and general framework for e-commerce within the internal market, to guarantee the legal protection and trust of consumers. The stronger protection of consumers, especially with regard to transparency and data protection, is also an unmistakable aim of this directive proposal.

4. Areas of application

The amended proposal for the directive should ensure, “the free movement of information society services between the member states" (article 1 paragraph 1). This point is referred to in the modified guideline proposal due to a suggestion to change the definition of the expression in the guideline 98/34/EC[7] which was cited word for word by the first proposal. “Information society services” are defined in that document as, “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services” According to this definition, the expression “at a distance” means that the service is provided without the parties being simultaneously present. “By electronic means” means that a service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means. “A service at the individual request of a recipient of services” means a service provided through the transmission of data on individual request.

This definition was already to be found in the "Transparency directive"[8] and in the directive on the legal protection of services based on, or consisting of, conditional access[9]. In this context an appropriate definition of “online services” must be found. As this definition is already well-known and recognised by the member states it does not require any repeated definition with regard to legal clarity and standardisation. The reference to the existing definition which has now been incorporated into the guideline proposal makes it clear that the expression “information society services” already belongs to existing common law (acquis communitaire). Services which do not to those of the information society, as stated by the recital 3 are television

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7 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.07.1998 p.37-48

8 cf. fn. 7

9 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ L 320 , 28.11.1998 p. 54-57

and radio broadcasts, as well as video-on-demand and the diffusion of commercial information, as these services are in each case of an economic nature.

5. Article 3: The country-of-origin principle

Probably the most important regulation set out by the proposal is the country of origin. Every member state is responsible for ensuring that the information society services which are carried out by service providers in its area of jurisdiction correspond to national regulation in those sectors designated by the guideline (article 3, paragraph 1) whereby the "coordinated field" represents the application of future European and national regulation to all service providers[10]. Any form of limitation imposed on the information society services is to be forbidden. It follows that service providers can only operate if their activities conform to the regulations of the country of origin, even if other regulations apply in the consumer's country. Moreover the recital specifically states that this directive does not intend to introduce specific regulation of international privacy laws over applicable law or the power of the courts and does not encroach upon the relevant international agreements. This internal regulation is in line with a general European legal principle which is familiar from the television directive[11], which is now to be applied to the Internet. The national law of the country in which the service provider carries out his services is to be respected, so the provider will have no need to fear restrictions or limitations in the country from which the service is being requested. This has the benefit for the provider that he does not need to inform himself of the numerous different national laws which are applicable in the community and take these laws into consideration. Service providers cannot know where requests for their services are going to come from. With regard to legal security and clarity the application of the principle of the country of origin with supervision and implementation at source would seem to be the most economically viable solution, although this is perhaps a solution which is the least conducive to harmonisation[12].

However, there is no application of the principle of the country of origin according to article 22 paragraph 2 in the sectors mentioned in appendix II of the Directive. This principle applies to patenting and copy right laws, to the protection of semi-conductors and data bases

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10 cf. *Hoeren*, MMR 1999, 192

11 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 , 17.10.1989 p. 23 - 30, amended by directive 97/36/EC dated 30.6.1997

12 According to *Hoeren*, MMR 1999, 192

according to the directives 87/54/EEC[13] and 96/7/EC[14], the spending of electronic cash, certain regulations concerning legal insurance and to advertising by email. In these areas the member states are free to impose more restrictive regulations.

Although the rule that information society services are to be supervised at source, the new recital 17a maintains that restrictions on the free flow of information society services on the part of member states under certain circumstances must be justified. Moreover these restrictions must be in line with European Community law and they must be necessary in order to achieve certain goals which are of benefit to the general public, such as the protection of minors, the prevention of discrimination, consumer protection and public safety.

6. Principle excluding prior authorisation

The principle of the free authorisation of information society services is maintained in the proposal for a directive, just as in the German Tele Services Act (Teledienstegesetz - TDG) and Media Services State Treaty (Mediendienstestaatsvertrag - MDStV). Member states are obliged to ensure, that service providers are able to operate without authorisation or license and are not obliged to make any other requests, which effectively make access dependent upon a decision, certain measures or a given authority (article 4, paragraph 1). However, according to article 4, paragraph 2 this principle does not apply to processes of authorisation which do not solely affect information society services, or which represent licensing according to telecommunications regulation in line with the directive 97/13/EC[15].

7. General information to be provided

Article 5 paragraph 1 gives a range of information, similar to article 4 of the distance selling directive[16] which are referred to in the modified proposal for a directive. According to the latest proposal the name of the service provider, as well as the address of its offices, its business registration number and the authority responsible for issuing the number, as well as its sales tax

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13 Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, OJ L 024 , 27.01.1987 p. 36 - 40

14 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27.03.1996 p. 20 - 28

15 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ L 117 , 07.05.1997 p. 15 - 27

16 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 , 04.06.1997 p. 19 - 27

number must all be displayed. The obligation to display this information will probably be incorporated into the proposal to help the user identify the service provider and to establish a point of contact in order to begin legal proceedings in the case of a conflict. This will also show which laws are applicable to the service provider according to the country-of-origin principal. The articles concerning price display in the Internet, namely paragraph 2 of article 5, will be changed in the new directive proposal in the sense that the obligation to display prices and other conditions of sale exactly and explicitly will be specifically mentioned. This means that from now on if prices are given then all additional costs must be taken into consideration.

8. Commercial communication

8.1. Definition

In article 2 subsection (e) the expression "commercial communication" is defined as "any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a liberal profession". Communications which present details allowing direct contact with the operations of a company, an organisation or a person, especially a domain name or an email address, do not count as commercial communications. In the context of this directive commercial communications are also not defined as information about goods, and services or the image of a company, an organisation or a person, which are presented independently and particularly at no financial cost to the user.

8.2. Compulsory information

Special conditions concerning compulsory information are presented in article 6. This article with its newly incorporated reference to the distance selling directive[17] regulates that commercial communication and the person involved in any contract resulting from it, must be clearly recognisable as such. In so far as sales promotions such as price reductions, free gifts or presents as well as competition from the member state, in which the service provider is based are concerned, these must be clearly identifiable as such. Articles 6 subsections (c) and (d) of the modified proposal contain a formulation of the country-of-origin principle.

[17] 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 , 04.06.1997 p. 19 - 27

8.3. Email advertising

Article 7 concerning junk email (spamming) now rules that the member states must take measures to ensure that service providers who send junk email, regularly check the "opt-out" register which people can naturally use if they do not wish to receive any junk email. Email advertising should continue to be clearly and unambiguously identified as such. The With the newly written recital 11 in this modified "E-commerce directive" the Commission has maintained that email advertising can be undesirable for both consumers and service providers and can be detrimental to the smooth and functional flow of interactive networks. Furthermore the receivers of email advertising should incur no additional costs resulting form it. However Appendix II of the directive leaves it to member states to make regulations concerning unsolicited commercial communication.

9. Regulated professions: Article 8

The realisation of information society services for regulated professions is permissible according to article 8, insofar as it corresponds to the professional rules guaranteeing independence, worth and respect of profession, professional secrecy and honourable behaviour with regard to customers and colleagues. However the expression "regulated professions" is not more explicitly defined in the modified proposal[18]. It should essentially refer to lawyers, doctors, tax consultants and accountants. Whether this will be understood in the same way in every country belonging to the Community remains to be seen. However According to article 22 paragraph 1 which refers to appendix I this directive is not applicable to the activities of lawyers.

In the spirit of the rules laid down by article 8 paragraph 1, the professional organisations of the regulated professions should establish generally applicable codes of conduct and should decide on the information, which can be given within the framework of carrying out information society services.

10. Electronic contracts

The section on "Electronic contracts" which would have been better headed with "Contracts completed electronically" contains far-reaching changes with regard to the previous direc-

[18] cf. Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 019 , 24.01.1989 p. 16 - 23

tive proposal. According to this section, the Commission's controversial "free rein"[19] which allowed it to make a ruling on exceptional cases via the committee process (cf. article 23), has been removed. The timing of the completion of contracts in article 11 has also been largely revised.

10.1. The treatment of electronic contracts

In article 9 the member states are required to make the electronic completion of contracts possible. The states must also ensure that the regulations concerning the completion of contracts neither prevent the practical use of electronic contracts, nor result in these contracts being invalid or not legally-binding merely because they have been initiated and completed electronically. However according to paragraph 2 this regulation should not apply to contracts, which require the presence of a solicitor, nor to contracts which must be entered in a register as well as contracts in the areas of family and inheritance law. The revised paragraph 3 now rules that the member states of the Commission must provide a complete list of the categories of contracts, which represent an exception to paragraph 2.

10.2. The obligation to provide information

Article 10 stipulates certain information which must be supplied in order to complete contracts electronically. According to article 10 paragraph 1 the process which leads to the formulation of a given contract, must be clearly and unambiguously stated. All codes of conduct which the service provider is subject to must also be stated (article 10, paragraph 3). These regulations are not applicable in cases of commercial parties who have come to a different agreement.

10.3. Moment at which the contract is concluded

The controversial regulation concerning the timing of contract completion has been changed so that if the user of a service is required to accept the offer of a service provider through the use of technical means, such as the clicking of an icon, the contract is completed as soon as the consumer has received confirmation of the reception of his acceptance from the service provider. The heavily criticised dual acknowledgement of receipt, whereby the user had to confirm receipt of the provider's confirmation of receipt, has been removed. The principles that the confirmation of receipt is valid when the consumer can access it and that the service provider must send acknowledgement of receipt immediately remain valid.

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19 cf. *Hoeren*, MMR 1999, 192

In article 11 paragraph 2 which has now been completed the service providers are obliged to make available effective and accessible mechanisms for the recognition and correction of entry mistakes and inadvertent errors before the contract is completed. The conditions of the contract and the general condition so business must also be at the disposal of the consumer, so that he/she can save and reproduce this information. The collective rules concerning the completion of contracts do not apply to cases where commercial partners have come to a different agreement.

11. Liability of Intermediary Service Providers

Another of the main focal points of the present directive proposal is the definition of the liability of intermediary service providers contained in articles 12-15. According to article 12 the service provider should only be responsible for the "Mere conduit" which is the title of article 12, and should not be responsible when he does not initiate the transmission, does not select the receiver of the transmission or when the provider does not select or modify the information contained in the transmission. According to article 12 paragraph 2, transmission only signifies the automatic temporary saving of the communicated information, as long as it does not take place for longer than transmission usually requires and the realisation of the transmission in the communication network. The so-called "caching", namely the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, should not entail any liability if certain conditions are fulfilled according to article 13. "Hosting," namely the provision of memory for the data of a user entails no liability for the provider according to article 14, as long as the provider has no knowledge that the memory is being used for illegal activity, or if he immediately acts to remove this information or block access to it as soon as he learns of illegal activity occurring. Finally article 15 indicates that service providers are given no monitoring responsibility as far as the information that is transmitted and saved by them is concerned. However specific, temporary measures to monitor content through national judiciary authorities in agreement with national law should remain in place.

12. Impact

Should the proposed outline for a directive finally be passed, this will pose many problems for both service providing companies on the one hand and German legislators on the other. On the basis of the new regulations which have been proposed, parts of the Information

and Communication Services Act (IuKDG) and the Media Services State Treaty (MDStV) must be revised. The current obligations to provide information, which fall under these standards, must also be supplemented. However the country-of-origin principle and the regulations regarding the electronic completion of contracts also require German legislators to make far-reaching changes to existing regulations. To date e-commerce offers on web sites were in Germany seen as a so called "invitatio ad offerendum"[20]. This assumption will now be overturned by the proposal which presents such offers as legally-binding. This new situation goes against some of the basic principles of German law which could lead to problems. The emphasis on consumer protection in the present proposal could entail considerable costs for companies and service providers. The chapter entitled "Email advertising" could also lead to uncertainties and problems in the commercial sector. According to this chapter companies should take into account the entries in a Robinson list (Opt-out list) in which users can register if they do not wish to receive email advertising. At the end of the day this solution represents a desirable ruling for consumers, but for companies who do not observe this list it represents the danger of possible prosecution and consumers suing for damages. However the practical details of what such a list should look like and how it is to be accessed has not yet been made clear. However the problem posed by email advertising is often not as difficult as it is made out to be. In this modified proposal for a directive it is left to the member states to deal with email advertising and formulate suitable regulation. Furthermore the ruling on email advertising in the directive proposal, just like the compulsory display of information, is only to be seen as a supplement to the distance selling directive from the Commission which must be incorporated into national law by June 4th 2000[21].

The national ministry of justice presented an outline for referendum on the distance selling act (Fernabsatzgesetz - FernAG[22]) regarding the implementation of the distance selling directive on May 31st 1999. The outline states that there is no need to implement article 10 of the distance selling directive[23] in which unsolicited commercial communication is regulated. This is justified by the fact that present German regulation corresponds to the restrictions imposed by the distance selling directive and surpasses them in some instances, which means that article 10 of the directive is already sufficiently implemented. Existing laws offer adequate room for sanc-

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20 Proposal for a European Parliament and Council Directive on a common framework for digital signatures, COM (98) 297-98/0191 (COD)

21 *Hoeren*, MMR 1999, 192

22 The outline can be accessed on http://www.bmj.bund.de/download/fernag.pdf in the Internet.

23 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 , 04.06.1997 p. 19 - 27

tions which means that no special regulation is necessary. So the German courts can continue to adhere to these laws even after the outline for a referendum on the distance selling directive, in regarding email advertising without the permission of the consumer as unfair competition and in this respect take advantage of the "Opt-out" solution set out in both article 10 of the distance selling directive as well as the directive outline under consideration.