

**Comments on revised drafts of the Electronic Commerce Directive (COM(1999)427 final and the Finnish version)**

1. The revised proposals still seek to create a single market online. As the working party has indicated in its comments on the original draft, this would inevitably lead to conflicts since commercial law generally varies so much between states. There is no single market off-line.
2. While users agree with this approach, many suppliers are looking for a single market on US terms – i.e. everything to be treated as if it were inter-state trade under American law. London is the freight forwarding capital of the world because of its ability to sort out the paperwork. We have to consider what is really in the UK's best interest.
3. Conflicts arise between directives because there are so many ad hoc derogations. The new Commission draft attempts to iron out some of these problems, partly by cross-referencing other directives, but taking the directives together, there is no coherent legal framework. It is far more important to concentrate on removing barriers to pan-European trade than to pursue legal coherence as an end in itself.
4. The option not to receive spam has been removed from the Finnish draft, thus weakening consumer protection. Some working party members favour an "opt-in" (rather than opt-out) arrangement but this would cripple the direct marketing business and also be technically difficult to achieve.
5. The definition of "*Information Society Services*" is more obscure than the original and over precise. It does not make any distinction between the mere use of networked services and providing them for public or commercial use.
6. The newly added definition of "*Consumer*" does not include small and micro businesses or self-employed individuals and 'home-workers'. If the directive is to achieve its objective of stimulating electronic trade, provision has to be made to give them the same protection as ordinary consumers and problems of loss through fraud should also be tackled. However, a watch should be kept to see that rules designed to protect the consumer do not interfere with business to business trade (which is projected to account for 80% of electronic transactions by volume in 2003).
7. All versions of the directive show confusion in relation to the terms "caching" "hosting" and "mirroring" and Articles 12 and 13 need to be reorganised and rephrased to fit reality.. A "mere conduit" is the exception rather than the rule and WORMs are the most efficient media at present for caching but that means they are not technically temporary. Caching is a process used by a mere conduit but mirroring is not. The issues are different and pose different problems. Any attempt to describe a technological process will ensure that the legislation is not technologically neutral and will be overtaken by developments.
8. Finally, there is concern at the Finnish proposal to delay implementation of the directive for 18 months after it is agreed. It is essential that the liability issues are clarified before implementation of the Copyright Directive, as originally intended by the Commission.
9. The working party is preparing a Status Report on these issues and a paper explaining the definitions of, and differences between hosting, caching and mirroring.