



STUDY ON THE DRAFT ELECTRONIC COMMERCE DIRECTIVE

The stated objectives of the Directive include:

- elimination of legal obstacles to the online provision of services, particularly cross-border;
- creation of a coherent European legal framework;
- reinforcement of the EU's position in international discussions;
- while paying particular attention to the special nature of the Internet and to self regulation.

Although the Commission's proposal to ensure freedom of establishment for information society service providers is to be welcomed, in many other respects the proposal falls short of these objectives. The Working Party is particularly concerned about the following features of the draft directive:-

1. The imposition of regulation that is seen to be unnecessarily restrictive or inconvenient may drive information society services offshore to the detriment of European economic prosperity.
2. The overall objective is cited as being: "The establishment within Europe of a genuine single market for electronic commerce so that businesses and citizens can receive and supply information society services irrespective of frontiers". This is inconsistent with the commonly declared aim of "ensuring wherever possible neutrality of treatment between electronic and conventional business", since a single market for the supply of "tangible" goods and services does not exist.
3. Attempts to establish a single market legal regime for electronic commerce will result in a conflict between the legal provisions in the proposal and existing laws of member states.
4. The Commission's approach to information society legislation has been piecemeal. It is said that the current proposal will complete the establishment of a coherent legal framework. In fact, the *ad hoc* issue of directives with extensive derogations results in conflicts between directives and perpetuates the diversity the Commission says it wishes to eliminate.
5. An obvious example is the difference between the Electronic Commerce and Distance Marketing of Personal Financial Services proposals with regard to contract formation.
6. Ministers of the G8 countries summarised their policy as: "working with the international institutions and the private sector to offer a seamless, decentralised global marketplace" (Birmingham, May, 1998). A pre-emptive strike by the EU in advance of international agreement makes achievement of the G8's objective more (not less) difficult and risks conflicts with our major trading partners outside the EU.
7. A significant obstacle is the potential liability of service providers who merely provide the means whereby other commercial concerns trade electronically with their customers. The Electronic Commerce Directive attempts to deal with this, introducing the concept of 'mere conduit'.
8. Unfortunately, different provisions are introduced for 'caching' and 'hosting' that do not reflect the technical realities.
9. One of the most significant derogations is in respect of consumer protection. Member states are therefore relatively free to take their own steps to protect consumers, subject to the overriding provisions of the Distance Selling Directives. The effect of this and other derogations is that cross-border electronic commerce will still require commercial organisations to undertake extensive legal research and thus the Directive will fail to lead to any significant reduction in legal costs (an objective of the Commission). Indeed, by adding another layer of regulation, it could result in an increase in such costs.
10. The Working Party also has concerns over the confusing use of language (e.g. the use of the term service provider with a meaning other than that used in normal 'Internet' parlance).