International Chamber of Commerce
The world business organization

Policy statement

International business comments on the proposed EU directive on certain legal aspects of electronic commerce

Commission on Telecommunication and Information Technologies, 27 July 1999

(European Commission Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market (COM (1998) 586 final)).

Background

World business has consistently recommended to governments that they can best support further growth of electronic commerce by focusing their energies on providing a basic legal and institutional framework that ensures effective competition as well as general trust through more predictable and media-neutral rules. The European Commission has stated that its primary aim in issuing the draft Directive on Certain Legal Aspects of Electronic Commerce is to respond to this call from the private sector and to eliminate certain legal obstacles that remain to the online provision of services, particularly for small and medium sized enterprises (SMEs).

In 1998, an alliance of key business organizations (the International Chamber of Commerce; the International Telecommunications User Group; the World Information Technology and Services Alliance; the Business and Industry Advisory Committee to the OECD and the Global Information Infrastructure Commission) representing a broad and diverse range of businesses in every part of the world issued a Global Action Plan for Electronic Commerce. This Global Action Plan highlights the following principles to attain the level of trust necessary to continue business investment in and use of electronic commerce and to engender consumer trust:

- Development of electronic commerce should be led primarily by the private sector in response to market forces.
- Government intervention, when required, should promote a stable, international legal environment, allow a rational allocation of scarce resources and protect general interest. Such government intervention should be no more than is essential and should be clear, transparent, objective, non-discr iminatory, proportional, flexible and technology neutral.
- The protection of users should be pursued through policies driven by choice, individual empowerment, and industry-led solutions.
- Business should make available to users the means to exercise choice with respect to privacy, confidentiality, content control, and under appropriate circumstances, anonymity.
- A high level of trust in the global information infrastructure/global information society should be pursued by mutual agreement, education, further technological innovation, and adoption of adequate dispute resolution mechanisms and private sector -elf-regulation.

Based on these principles and business's agreed positions in the Global Action Plan, we offer the following comments on the draft Directive.

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1. General comments

International aspects
The executive summary states as one objective of the Directive to "ensure a major role in international negotiations." Likewise, the Directive states in Principle 4 that it is intended to refrain from dealing with external aspects.

We consider that timely international coordination of substantive choices made in this Directive will be as important as harmonization of rules within the EU, if the Directives long-term benefits are to be realized. Electronic commerce is international by definition and requires international coordination of policies. We trust that the European Commission will do everything within its power to ensure that all rides applying to electronic commerce are interoperable and applied in a non-discriminatory manner in the interest of global electronic commerce. ICC is willing to assist the European Commission in working with other governments to ensure timely coordination of the appropriate solutions proposed in the Directive.

Business-to-business electronic commerce
We believe that it is imperative that party autonomy be underlined in the Directive as the guiding principle applying in all circumstances in commercial transactions where the law does not explicitly state otherwise. Where governments deem it necessary to depart from this principle for certain aspects of consumer transactions, a clear distinction between these types of transactions should be made in spite of the draft Directive's horizontal character. However, ICC believes that such departures should be limited, well defined and narrowly tailored.

2. Specific comments

Objective and scope
The scope of application and, where relevant, individual provisions, of the proposed Directive should more expressly indicate that it applies to electronic commerce both in goods and services.

Establishment and information requirements
Business is very pleased with the "country of origin" choice made in the draft Directive as regards business-to-business transactions, as any other determinant would create a very significant barrier to electronic commerce for small and medium-sized enterprises and business generally. Furthermore in reiteration of the position that business has taken with regard to the OECD's efforts to create consumer guidelines for electronic commerc e, we believe that the only realistic approach to promoting an electronic commerce marketplace that empowers the consumer is an international acceptance of the country of origin principle combined with an emphasis on business self-regulation such as recommended by ICC and other business organizations, and on the strict observance of international treaties and conventions such as the TRIPS agreement concluded during the Uruguay round of multilateral trade negotiations. However, "establishment" is not defined and it is unclear whether this requires legal incorporation in a member state or registration with administrative authorities.

It is clear that in any event under the current definition of "established service provider" (Article 2.c) country of origin treatment would not be extended to companies whose electronic commerce offerings are accessible in EU member states but that have no physical presence in a member state.

The obvious potential harm to seamless global electronic commerce of such a regionally limited approach reinforces our view, stated above under general comments, that those aspects of the draft

Directive that of necessity have implications for international electronic commerce and global legal certainty for the consumer require a greater degree of international coordination prior to adoption of the Directive.

With that proviso, we fully support Art. 4 which prevents member states from requiring prior authorization or any other similar requirement for companies to provide a service electronically. However, we suggest that Article 4(2) could be improved by adding as a new last sentence "However, existing authorization schemes should be adapted to allow a rapid uptake of online activities."

We consider it essential that Art. 5(2) be redrafted to distinguish between consumer and business-to-business transactions. Technology leads to a blurring of the distinction between consumer and business user, which calls for a careful drafting of the boundary. Whereas there may be some merit in requiring providers of consumer goods and service to indicate their prices "accurately and unequivocally", this provision does not allow for the flexibility that is needed for normal commercial negotiations in business-to-business transactions. Application of this requirement to business-to-business transactions could be seen to constitute an unreasonable deviation from the principle set out in Article 14.1 of the 1980 UN Convention on contracts for the international sale of goods (Vienna Sales Convention), as a widely adopted instrument governing international sales among businesses worldwide, which provides for price to be determined even implicitly in accordance with relevant trade practices.

Commercial communications
We consider that the definition of commercial communication in Chapter 1 Article 2(e) is overly broad. Under our interpretation the definition would cover web sites, which could have a detrimental effect on e-commerce. Art. 2(e) definition covers "any form of communication designed to promote, directly or indirectly, goods, services or the image of a company (with the exception of a domain name or an e-mail address)". Broadly interpreted, this could cover almost every corporate web page as well as an individual's web page.

A web site address is not advertising or commercial communication in the traditional sense but a necessity for a company to participate in online commerce.

For many SME's, a web site has enabled them to have a virtual storefront that they would be unable to afford in the paper-based world. Web sites are created so that consumers can find information on products and services, contact the company with inquiries or complaints, and a place where they can purchase products and services. This information empowers and educates consumers. A web page provides consumers with direct access to the activity of the company and should not be considered or regulated as a commercial communication.

Finally, the definition of commercial communication appears to have extraterritorial reach, applying to web sites not even hosted in the EU, but accessible by citizens of the European Community. If that is indeed the case, the definition would conflict with Principle 4 of the draft Directive, which we support.

Electronic contracts
The ability for parties to conclude electronic contracts and to be assured that these contracts are valid, legally recognized contracts that if necessary will be upheld by courts of law is imperative to the growth of the information society. Electronic commerce is revolutionizing the way both private sector entities and governments conduct business. Electronic commerce allows business and governments to conclude and execute contracts in a more secure and efficient manner.

We consider that the European Commission should seize the opportunity of this harmonizing Directive to promote to the fullest extent possible implementation at Member State level of the UNCITRAL Model Law on Electronic Commerce.

With reference to Article 9(1), we consider that any exceptions to the principle of Article 9(1) should be as limited as possible. Allowing Member States to make such exceptions without proper guidance on the possible implications of such a restriction could jeopardize the rapid uptake of electronic commerce in some sectors. In addition, the reasons behind some of these exceptions may disappear over time with the development of technology for online notarization and the fulfillment of other additional form requirements that may characterize certain types of contracts. Therefore, we believe that the Commission should closely monitor the development of such technologies and provide for a withdrawal ability Commission level of any of the exceptions listed in the Directive and notified by Member States as soon as technology is deemed to provide means of fulfilling specific form requirements that are equivalent to traditional means.

As regards the specifications provided by Article 10, we reiterate our general comment that a clearer distinction should be drawn between business-to-business and business-to-consumer transactions. In addition, particular attention should be paid to the need to ensure coordination with parallel EC legislation, notably with Directive 97/7/EC on distance contracts and the withdrawal right it grants to consumers (Art 6). Such right presupposes the possibility of return of the good received, which may not be reasonably possible in the electronic environment.

We further consider that requiring the recipient of the service to confirm receipt of the service provider's acknowledgment of receipt (Article 11(I.a, second bullet)) carries the objective of legal certainty too far at the expense of ease of use for participants in the online marketplace. This requirement imposes an unnecessary barrier to electronic commerce, which may deter users from acquiring online services.

In general, we believe that the legal principles underlying contract conclusion are well-established in contract law and will clearly apply to electronic contracts by virtue of Article 9 of the draft Directive.

Liability of intermediaries
The draft Directive language on the liability of intermediaries is reasonably balanced. The draft Directive rightfully acknowledges service providers' limited liability for serving as a conduit for information. Limiting ISP liability to a degree that is consistent with their role and their degree of control will greatly increase legal certainty and promote electronic commerce. While we support the directives general approach to the service provider liability provisions on the conduit, caching, hosting and no obligation to monitor, we would add one important revision. Liability protection should not be pre-empted if a provider modifies information contained in a transmission. Information service providers, in the broadest sense, routinely translate or select information based on pre-determined rules.

We further suggest that the European Commission may consider including additional liability issues, such as the liability of other types of intermediaries; liability of search engines or service providers providing hyperlinks to possibly illegal web addresses; and the liability of service providers complying with "notice and take down" procedures when the notice turns out to be wrong.

We think it would be preferable to delete the word "general" from Article 15.1 in both instances so that no (general or specific) obligations could be imposed outside the specific exceptions listed in Article 15.2.

Finally, the relation with the EU Copyright Directive should be clarified in order to ensure consistency of approach.

Implementation
We support the draft directive's call for Member States to encourage voluntary, industry codes of conduct and to make these codes accessible to citizens of the European Community. We respect the practice in some branches and member states to discuss this kind of code with consumers. We also fully support the promotion of the codes to consumers and industry efforts to educate and empower consumers about their rights and protection in the online environment. However, Article 16 (2), which would require that consumer associations be involved in the drafting and implementation of codes of conduct, contradicts the very nature of business self-regulation, which the responsibility of the private sector in response to market forces which inherently involves a consideration of consumer preferences.

We also suggest that the utility of codes of conduct applies to issues covered in the Directive beyond Articles 5-15, and we encourage the Commission to review possibilities for including more of the draft Directive's provisions in this approach.

It is important to recognize that self-regulation in the digital environment is much more than codes of conduct, and that many of the most effective and innovative business self-regulatory actions in electronic commerce involve specific technical solutions such as software.

As regards Article 17, we suggest that this be redrafted to also take into account conciliation procedures, which provide a more flexible and less burdensome mechanism for settling in particular smaller disputes which otherwise might remain unresolved merely because of the high cost and complexity of other, more binding dispute settlement procedures. EC Directives 93/13/EEC concerning unfair contract terms and 97/7/EC on distance contracts may suitably provide a model for a more comprehensive formulation of the article in question.

Exclusions and derogations
Generally, we believe that the delimitation of the scope of application of the proposed Directive should be simplified, reducing the need to consult various annexes and other provisions.

Article 22(2) limits the applicability of the country of origin principle enshrined in Article 3 by reference to Annex II. We recommend that the exceptions "contractual obligations concerning consumer contracts" and "unsolicited commercial communications by electronic mail, or an equivalent individual communication", as well as the exceptions on copyright, neighbouring rights and intellectual property rights be reconsidered as their inclusion in the exceptions does not seem warranted. In the case of intellectual property rights, their inclusion may lead to an obligation for all services provided over the Internet to comply with sometimes differing intellectual property rights in all EU member States (France Telecom). In addition, we believe that the term "Consumer contracts" requires a detailed and narrow definition. We further urge the Commission to provide a more precise definition of "unsolicited commercial communication" (so as to distinguish such communications from practices such as spamming), and to review the consistency of the associated exception to the country of origin principle with the EU Data Protection Directive, with which it may conflict by not prohibiting Member States to restrict the free movement of personal data and thus of "unsolicited commercial communications". In addition, the relation between these exceptions and the Treaty of Rome should be clarified.

We further recommend to amend Article 22(3.a.i) as follows: "By way of derogation from Article 3(2), *and without prejudice to Article 10 of the European Convention on Human Rights which guarantees the freedom of expression, which includes the freedom of commercial speech*, or to court actions "

As a more general comment, while we recognize the need for the directive to be flexible enough to provide member states with the ability to reflect national security interests, protect public health and maintain public security, a broad derogation based on insufficiently defined categories (such as consumer protection and public policy) leave a significant amount of room for member states to jeopardize the legal certainty provided by the directive. In order to provide the level of legal certainty necessary to promote e-commerce, we recommend that member states be asked to submit specific reasons for derogating from the directive. For example, rather than a broad carve-out for public policy or consumer protection, member states should be required to list specific activities such as the protection of minors, fight against any incitement to hatred, protect against consumer fraud, etc. We consider that a certain level of specificity is necessary to raise the level of legal certainty.

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