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18 March 1999

**Proposed directive on certain legal aspects of electronic commerce in the internal market**

[COM(1998)586 FINAL 98/0325 (COD)]

UNICE preliminary comments

***Executive summary***

□ UNICE believes that the following principles are essential to the development of a competitive environment for electronic commerce and should be applied to legislation and other measures that impact on electronic commerce:

- Existing legislation should apply 'on-line' as it does 'off-line'.
- New legislation should only be introduced where necessary to provide certainty and to promote confidence in electronic commerce, and should be based on the free movement of goods, persons, services and capital, as well as the freedom to establish a business anywhere.
- Legislation should not prevent businesses, particularly small and medium enterprises, from exploiting the business opportunities offered by electronic commerce.
- Legislation should be technologically neutral, should not favour one technology over another, and should not prevent development of new technologies.

□ UNICE is of the opinion that the Commission's proposal is a commendable step towards setting up a framework for electronic commerce but that the current proposal falls short on some of the issues addressed in the attached paper. These are important areas, which need to be revisited, and on which UNICE is willing to provide any needed expertise, in addition to these preliminary comments.

□ UNICE believes that the global nature of the information society cannot be over-emphasised. The global information infrastructure is intended to cover the whole planet and the business community therefore sees *worldwide cooperation* as absolutely crucial to development of the information society. Consequently, while it acknowledges the need to consider the functioning of the internal market, UNICE urges the European Commission to take an international perspective in this area and to cooperate very closely with the EU's main trading partners.

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UNICE PRELIMINARY COMMENTS**I. PRELIMINARY REMARKS**

UNICE has noted the European Commission proposal for a Directive on certain legal aspects of electronic commerce in the internal market and it welcomes the offered opportunity to comment on the proposed instrument. It proposes to use this preliminary comments to outline the present state of thinking on the subject within European industry.

All the sectors of activity which UNICE represents are or will be involved in the new digital world created by the information society. Their future development prospects in this area will be highly influenced by the legal framework put in place. The issues dealt with by the proposed Directive are of great importance to rightholders, users, service providers and equipment manufacturers. All these players have a specific contribution to make to development of the information society and neglecting any specific interests would run counter to establishment of the harmonious framework needed in the digital world.

In the comments below, UNICE voices general views on the proposed Directive with a view to contributing to building a framework for legal aspects of electronic commerce which will not hinder the development of any of its participants.

**II. KEY PRINCIPLES**

After a careful assessment, UNICE believes that the following principles are essential to the development of a competitive environment for electronic commerce and should be applied to legislation and other measures that impact on electronic commerce:

1. Existing legislation should apply 'on-line' as it does 'off-line'.
2. New legislation should only be introduced where necessary to provide certainty and to promote confidence in electronic commerce and should be based on the free movement of goods, persons, services and capital, as well as the freedom to establish a business anywhere.
3. Legislation should not prevent businesses, particularly small and medium enterprises, from exploiting the business opportunities electronic commerce brings.
4. Legislation should be technologically neutral, should not favour one technology over another, and should not prevent development of new technologies.
5. Given the global nature of electronic commerce, global agreement on certain issues should be pursued in parallel of defining local solutions.

UNICE is of the opinion that the proposed Directive has met a large proportion of these principles, in particular by:

- confirming, in general, the country of origin principle and promoting the single market and establishment of the freedom to provide "information society services";
- regulating areas where certainty is essential, namely areas relating to certain aspects of electronic contracts, defining place of establishment and clarifying the liability of service providers;
- remaining essentially technologically neutral.

However, UNICE believe that certain aspects of the proposed Directive do not reflect these principles and that they will serve to limit competitiveness and therefore exploitation of the opportunities offered by electronic commerce within the European Union. In particular the proposed Directive:

- has the potential to establish different environments “on-line” and “off-line” which could lead to uncertainty. Country of origin regulation is key to the internal market. Where goods or services comply with the laws of the country in which they originate, they should not be excluded from the other member states for failure to comply with divergent regulatory regimes;
  - creates, albeit in limited circumstances, different features for certain contracts in an on-line environment. This is likely to lead to uncertainty;
  - creates uncertainty as a result of the ambiguities and overlap between the proposal and other existing and proposed Directives including those in respect of distance selling and “ISDN”.
- UNICE believes that the proposed Directive will be of limited effect as it can only create a framework for the European Union. However, UNICE welcomes the recognition that electronic commerce is a global issue and that the aim of the proposed Directive is to “secure a major role in international negotiations” for the Community significantly contributing to the “establishment of a global policy for electronic commerce”.
- UNICE's fundamental concern is that the proposed Directive fails to create the certainty that is required in the areas detailed in this paper. The additional costs to business which these uncertainties will generate may severely limit development of electronic commerce within the European Union.

### **III. COMMENTS ON THE PROVISIONS OF THE PROPOSED DIRECTIVE**

#### **A. CHAPTER I - GENERAL PROVISIONS**

##### **Article 2(a)**

The definition of Information Society Services in Article 2(a) (“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”) suggests that ‘unsolicited’ services are outside the ambit of the proposed Directive. Presumably this is an error since Annex II provides a derogation from Article 3 as regards unsolicited commercial communications.

##### **Article 2(d)**

“Recipient of the service” is defined to include natural or legal persons acting for professional ends or otherwise. This raises a number of issues and requires clarification:

- “Natural persons”, could include consumers as well as sole traders. The term “consumers” is referred to several times, including in Recital 19 and Annex II.
- “for professional ends” appears to be used in the context of ‘business’ ends. The term “regulated professions” is used without clarification in Article 8.

A distinction needs to be made between those provisions which apply to all electronic transactions; establishment, liability of service providers and certain aspects of electronic contracts and those which apply either to consumer situations or to businesses (whether a natural or legal person).

##### **Article 2(f)**

The definition “co-ordinated field” requires clarification.

#### **Article 3 - Annex II - Derogations**

##### **Consumer contracts**

The proposed Directive does not define these. Recital 19 refers to “information on the essential elements of the contents of the contract”. In UNICE's opinion this includes advertisements and other promotional materials. The effect of this will be to bring commercial communications within the scope of the derogation and as a result both solicited and unsolicited commercial communication will fall outside the ‘country of origin’ principle and be regulated individually by member states. The issue is further confused by the exclusion of unsolicited commercial communications from the definition of Information Society Services in the Directive. UNICE opposes this.

#### ***Unsolicited commercial communications by electronic mail, or by an equivalent individual communication.***

The same comments apply here as to consumer contracts. In addition, a global e-mail preference service is being set up to give individuals the right to opt out.

## **Article 22**

The further derogation to Article 3(2) which enables member states to impose additional measures for consumer protection is unnecessary. This is particularly undesirable given the wide range of existing community measures for the protection of consumers including for example:

- Directive 97/7/EC on the protection of consumers in respect of distance contracts
- Directive 92/59/EEC on general product safety
- Directive 85/374/EEC on liability for defective products
- Directive 93/13/EEC on unfair terms in consumer contracts
- Directive on injunctions for the protection of consumer interests
- Proposed Directive on the sale of consumer goods and guarantees

## **B. CHAPTER II - PRINCIPLES**

### **Section 1 - Establishment of Service Providers - Articles 4 and 5**

The establishment of a “right to site” in Article 4 is extremely welcome. Businesses lawfully established in a member state should be free to supply services electronically should they so wish. The term “accurately and unequivocally” in Article 5(2) should be replaced with provisions equivalent to those in Article 4 of Directive 97/7/EC. Service providers should be required to state separately:

- the price of the information society service including all taxes and;
- where appropriate, delivery costs.

### **Section 2 - Commercial Communications - Articles 6-8**

The provisions in Article 6 and 7 largely reflect the position in the ‘off-line’.

Clarification is required, for the purposes of the proposed Directive, as to which professions are to be regarded as “regulated” professions (article 8) as they may vary between member states.

### **Section 3 - Electronic Contracts - Articles 9-11**

UNICE supports the principle that the law should apply ‘on-line’ as it does ‘off-line’. Members therefore strongly support the requirement in Article 9(1) that member states be required to ensure their legislation allows contracts to be concluded electronically and that the validity of such electronic contracts should not be challenged.

Articles 9-11 raise the following concern. The requirements for the creation and conclusion of contracts. Article 11(1) establishes that the contract is concluded when the recipient receives “an acknowledgement of receipt of the recipient’s acceptance”. This presupposes that the provider’s communication is always an offer, which can be accepted by the recipient, and that the recipient always knows that it is an offer. In fact, the provider’s communication may be an ‘invitation to treat’ and the recipient’s communication an ‘offer’ which the provider may or may not accept.

### **Section 4 - Liability of Intermediaries - Articles 12-15**

UNICE welcomes the introduction of this section. Development of the Information Society will be hindered unless service providers know that they will not automatically be liable for content wrongly placed on or passed through their service by their customers. We agree that the three cases of straight transmission (“mere conduit”), caching and hosting should all be dealt with.

We agree with the general standard of awareness set in the draft before the provider becomes liable for more than injunctive relief.

The absence of an obligation to monitor all information transmitted in Article 15 is a welcome recognition of the impossibility of such a task. This exemption should apply to Article 13 also. In addition to these provisions the proposed Directive should address:

- The issue of liability of other intermediaries such as indexing and search agencies;
- The issue of responsibility and compensation in cases where material is removed or blocked by a service provider as a result of an allegation of infringement that is subsequently shown to be false.
- Since liability aspects of this proposed Directive are interrelated with the proposed Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (the

Copyright Directive), UNICE believes that it is desirable that proposed Directive should come into force no later than the Copyright Directive itself.

#### **IV. Conclusion**

□ First, and most important, UNICE believes that the global nature of the information society cannot be over-emphasised. The global information infrastructure is intended to cover the whole planet and the business community therefore sees *worldwide cooperation* as absolutely crucial to development of the information society. Consequently, while it acknowledges the need to consider the functioning of the internal market, UNICE urges the European Commission to take an international perspective in this area and to cooperate very closely with the EU's main trading partners.

□ UNICE is of the opinion that the Commission's proposal is a commendable step towards setting up a framework for electronic commerce but that the current proposal falls short on some of the issues addressed above. These are important areas, which need to be revisited, and on which UNICE is willing to provide any needed expertise, in addition to these preliminary comments.

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