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*****II**

RECOMMENDATION FOR SECOND READING

on the Council common position for adopting a European Parliament and Council directive on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

(14263/1/1999 – C5-0099/2000 – 1998/0325(COD))

Committee on Legal Affairs and the Internal Market

Rapporteur: Ana Palacio Vallelersundi

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

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PROCEDURAL PAGE

At the sitting of 6 May 1999 Parliament adopted its position at first reading on the proposal for a European Parliament and Council directive on certain legal aspects of Information Society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (COM(1998) 586 – 1998/0325 (COD)).

At the sitting of 2 March 2000 the President of Parliament announced that the common position had been received and referred to the Committee on Legal Affairs and the Internal Market (14263/1/1999 – C5-0099/2000).

The committee had appointed Ana Palacio Vallelersundi rapporteur at its meeting of 23 September 1999.

It considered the common position and the draft recommendation for second reading at its meetings of 28 February, 21 March and 11 April 2000.

At the last meeting it adopted the draft legislative resolution unanimously.

The following were present for the vote: Ana Palacio Vallelersundi, chairman and rapporteur; Ward Beysen and Rainer Wieland, vice-chairmen; Nuala Ahern, Maria Berger, Bert Doorn, Raina A. Mercedes Echerer, Enrico Ferri, Janelly Fourtou, Geneviève Fraisse, Marie-Françoise Garaud, Evelyne Gebhardt, Gerhard Hager, Malcolm Harbour, Anneli Hulthén, The Lord Inglewood, Ioannis Koukiadis, Klaus-Heiner Lehne, Donald Neil MacCormick, Toine Manders, Hans-Peter Mayer, Manuel Medina Ortega, Bill Miller, Angelika Niebler, Imelda Mary Read, Carlos Ripoll i Martínez Bedoya, Antonio Tajani, Diana Paulette Wallis and Joachin Wuermeling.

The recommendation for second reading was tabled on 12 April 2000.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council directive on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (14263/1/1999 – C5-0099/2000 – 1998/0325(COD))

(Codecision procedure: second reading)

The European Parliament,

- having regard to the Council common position (14263/1/1999 – C5-0099/2000),
 - having regard to its position at first reading¹ on the Commission proposal to Parliament and the Council (COM(1998) 586² - C4-0020/1999),
 - having regard to the Commission's amended proposal (COM(1999) 427³),
 - having regard to Article 251(2) of the EC Treaty,
 - having regard to Rule 78 of its Rules of Procedure,
 - having regard to the recommendation for second reading of the Committee on Legal Affairs and the Internal Market (A5-0106/2000),
1. Approves the common position;
 2. Notes that the act is adopted in accordance with the common position;
 3. Instructs its President to sign the act with the President of the Council pursuant to Article 254(1) of the EC Treaty;
 4. Instructs its Secretary-General duly to sign the act and, in agreement with the Secretary-General of the Council, to have it published in the Official Journal of the European Communities;
 5. Instructs its President to forward its position to the Council and Commission.

¹ OJ C 279, 1.10.1999, p. 403.

² OJ C 30, 5.2.1999, p. 4.

³ OJ C, not yet published.

EXPLANATORY STATEMENT

1. BACKGROUND

The Commission adopted its proposal for a directive on 18 November 1998¹.

The proposal was forwarded to Parliament, the Council and the Economic and Social Committee on 23 December 1998.

The Economic and Social Committee delivered its opinion on 29 April 1999².

On 6 May 1999 Parliament adopted at first reading, under the codecision procedure (Article 251), a legislative resolution (A4-0248/1999)³ approving the Commission proposal, subject to the amendments contained in the resolution, and calling on the Commission to alter its proposal accordingly.

On 17 August 1999, pursuant to Article 251 of the EC Treaty, the Commission adopted an amended proposal (COM(1999) 427 final)⁴ incorporating, verbatim or in essence, most of the amendments adopted by Parliament at first reading.

On 28 February 2000 the Council, acting pursuant to Article 251(2) of the EC Treaty, adopted a common position on the proposal for a directive.

2. OBJECTIVES OF THE DIRECTIVE

The proposed directive seeks to ensure that the internal market principles of free movement of services and freedom of establishment also apply to Information Society services and that service providers can operate throughout the European Union beyond legal frontiers.

Information Society services are defined as services normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of the service. Sound and television broadcasting services, which come under the 'Television without Frontiers' Directive, are excluded from its scope. As this definition was already included in Directive 98/34/EC, a reference to it was incorporated in response to a first-reading amendment by Parliament.

With the exception of some specific areas, for which there is express provision for derogations, the directive will stipulate that Information Society services are normally subject to the national law of the Member State in which the provider is established and that other Member States where these services can be received must not restrict the freedom to provide Information Society services. The directive will therefore apply the principle of 'mutual

¹ COM(1998) 586 final of 18 November 1998, OJ C 30, 5.2.1999, p. 4.

² OJ C 169, 16.6.1999.

³ OJ C 279, 1.10.1999, p. 257.

⁴ Not yet published.

recognition' of national rules in the 'coordinated field', i.e. 'requirements ... applicable to Information Society service providers or Information Society services, ...'.

The proposal thus endeavours to eliminate the barriers caused by obstacles to on-line service provision by focusing on five key areas:

- (1) Definition of the place where operators are established: This is defined as the location of the fixed establishment from which the operator pursues his economic activity, regardless of the location of Internet sites or servers used by the operator or of the location of any post office box he may have;
- (2) Commercial communication (advertising, direct marketing, etc.): Such communication is subject to certain transparency rules. Accordingly, it is stipulated that commercial communication via electronic mail must be clearly identifiable. Furthermore, with regard to regulated professions (e.g. lawyers) national legislation must allow on-line service provision on condition that there is compliance with rules on professional ethics. With a view to this, codes of conduct must be drawn up by professional organisations;
- (3) On-line conclusion of contracts: The proposal requires Member States to make sure that their legislation provides for the possibility of using electronic means to conclude contracts, specifying – in some cases - the moment when a contract is concluded, with due regard for freedom of contract. This aspect of the directive - determining the moment when an on-line contract is concluded - has been substantially altered by the Council in its common position, Article 11 of which being limited to formalities concerning the placing of orders;
- (4) Liability of intermediaries: The proposal spells out the liability of on-line service providers in respect of the transmission and storage of information belonging to third parties, making provision for derogation where providers act as 'mere conduits' and limiting their liability in respect of other intermediary activities such as caching and hosting;
- (5) Implementation of existing rules: Encouragement is to be given for codes of conduct to be drawn up at Community level, administrative cooperation between member States is to be fostered, and the introduction of efficient systems for dispute settlement on a cross-border basis is to be facilitated. With regard to derogations, the prospective directive would not apply to the following areas: taxation, private data, notaries' activities, representation and defence of clients before courts, and gambling. In addition, Member States will be authorised to impose restrictions on on-line services provided from another Member State on public policy, public health, public security or consumer protection grounds. Those restrictions must be proportionate to the objective pursued and, of course, must be in line with Community law. Except where there is urgency, a Member State that imposes restrictions must give notification of them to the Commission and the service provider's Member State of origin.

In other areas, the directive will rely on existing Community instruments ensuring harmonisation in specific sectors or on specific issues, in particular in the field of consumer protection.

3. PARLIAMENT'S OPINION AT FIRST READING

In line with the report adopted on 22 April 1999 by the Committee on Legal Affairs and Citizens' Rights, Parliament approved the proposal for a directive, with amendments, on 6 May 1999.

The main purpose of the amendments was to clarify the question of the liability of intermediate service providers and to step up consumer protection further.

Parliament gave its full backing to the fundamental principle underpinning the Commission proposal, viz. that, except in some instances, Information Society services must be in conformity with the legislation of the country in which the service provider is established.

One exception to the principle of control by the State of origin relates to contractual obligations in contracts concluded by consumers. Parliament amended the text to scale down this derogation to contractual obligations that have not been harmonised at Community level.

Parliament deleted the reference, in the recitals, to international conventions concerning conflicts of law or jurisdiction, since such a reference might suggest a hierarchy of norms which, in reality, the directive did not seek to introduce.

With regard to consumers, Parliament voted to strengthen the text in respect of the practice - termed 'spamming' in English - of sending commercial e-mail messages. While the Commission simply proposed that such messages should be easily identifiable as such, Parliament added the requirement for Member States to make sure that consumers can avoid receiving such messages by having themselves entered in an opt-out register.

Parliament approved the principle in the Commission proposal that the liability of on-line service providers should be limited to the transmission and storage of information from third parties, but added a recital (Amendment 11) to make it mandatory for such companies to keep all appropriate information for tracing and identifying parties offering unlawful content, with due regard for Community rules on data protection. Parliament's amendment on this point (Amendment 54), to the corresponding provision of the proposal for a directive, narrows the scope of this requirement, however, limiting it to 'reasonably necessary steps to accommodate ... industry standards' in this connection.

Lastly, Parliament pressed for cooperation with third countries in the area of e-commerce, in particular with applicant countries and the European Union's transatlantic partners, to be stepped up.

4. THE AMENDED PROPOSAL

The Commission's amended proposal of 17 August 1999 incorporates most of the amendments adopted by Parliament.

However, the Commission did not incorporate the scaling down of the consumer contracts derogation or the amendments on the liability of intermediate providers.

5. ANALYSIS OF THE COMMON POSITION

The common position incorporates most of the amendments adopted by Parliament at first reading and has maintained the balance of the amended proposal.

However, the Council has made two substantive changes to the proposal:

- 'comitology' arrangements have been deleted (as had already been called for, to some extent, by Parliament);
- Article 11 no longer relates to the moment at which a contract is concluded as such; rather, it relates solely to the requirement to send an acknowledgement that an order has been received.

On two important issues, furthermore, the Commission (in its amended proposal) and the Council (in its common position) have adopted a different stance from that adopted by Parliament at first reading;

- Scaling down of the consumer contracts derogation: The Commission and the Council have not incorporated Parliament's amendment calling for the scope of the derogation on contractual obligations in contracts concluded by consumers to be narrowed by limiting it to contractual obligations which have not been harmonised at Community level. The derogation has not been broadened either. It must be pointed out, however, that this derogation simply maintains the status quo; it does not take a stance on the law applicable to contractual obligations in consumer contracts. Determining the applicable law will depend both on application of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations and on the principle, laid down by the Treaty, of free movement of services. According to how the Convention is interpreted and to the circumstances of the case in question, and depending on whether or not a harmonised area is involved, either the law of the country of origin or the laws of the consumer's country will apply. Any clarification of this issue which proves necessary in future, however, could be dealt with as part of the review of the Rome Convention (already envisaged in the Council's action plan) or the review of this directive.
- Liability of intermediate providers: Parliament introduced a series of amendments in this area which have not been incorporated by either the Commission or the Council. It emerges that the balance proposed by the Commission is the product of an arrangement between the two parties most concerned – beneficiaries and intermediate providers - even if each would have liked to obtain a little more by way of concessions from the other. Furthermore, admittedly, some of Parliament's amendments were likely to raise questions concerning rules on privacy protection and personal data protection. Lastly, some questions will have to be resolved by the parties themselves

under codes of conduct, in particular questions relating to 'notice and take down' procedures. Under Article 21 of the directive, the first review report must address this question plus the question of liability of providers of search engine services and hyperlinks. The report must also consider the need for any proposals in the light of technological developments and case law.

Balanced solutions have been found to a number of other sensitive issues.

Consumer protection: The common position has incorporated Parliament's amendments seeking to strengthen consumer protection aspects (amending Articles 2, 5, 7, 11(2) and 16). The directive will unquestionably improve the position of consumers: they will be better informed (about the service provider's identity and place of establishment, about the authorities supervising providers, about the commercial communications contained on a web site and about the conclusion of contracts). In addition, consumers will enjoy greater legal certainty in the contractual process, in particular because it will be mandatory for service providers to send an acknowledgement that an order has been received and they will have to provide them with means of identifying and correcting input errors. Lastly, in the event of disputes, consumers will have access to effective means for both out-of-court and court settlement and to contact points, in each Member State, responsible for assisting them.

Financial services: The directive will apply to financial services provided on the Internet and will complement existing directives in this area, including the prospective directive on the distance marketing of consumer financial services¹. The common position maintains the balance of the original proposal, supported by Parliament, by not adding derogations to those already provided for in the annex, which include the derogation for contractual obligations concerning consumer contracts (applicable to the sale of consumer financial services). The common position points out, without broadening the scope, that the case-by-case derogation provided for in Article 3(4) also covers investors acting as consumers. Lastly, the questions concerning the relationship between e-commerce and financial services which are not dealt with by the directive will be addressed as part of work that the Commission has set in train in this area.

International private law: As called for by Parliament, the common position puts an end to any doubt as to the primacy of the directive over international private law by stipulating that, although the directive does not as such constitute an additional set of rules of international private law, the effect of applying that law must not be such as to restrict the free movement of Information Society services as provided for in the directive. Article 3 is applicable in all areas of national law, including private law (with the exception of the questions referred to in the annex). Lastly, the common position makes it clear that it does not address the jurisdiction of courts; indeed, Article 3 addresses only the question of the legislation to be complied with by an Information Society service.

Unsolicited commercial communications: The common position incorporates the Parliament amendment on opt-out registers by making it mandatory for providers who send unsolicited commercial communications to consult and respect available registers. That does not prevent Member States with an opt-in system from keeping it at national level. It should be noted that the derogation in the annex from the principle of home country control, with regard to

¹ Common position pending. See first-reading report A4-0190/1999, OJ C 279, 1.10.99, p.4.

authorisation of unsolicited commercial communications, has been maintained. However, the Article 21 review clause specifically refers to the possibility of removing that derogation. In this connection, there will have to be a look at the way in which the codes of conduct now being drawn up have been applied.

Cybercrime and protection of minors: The common position contains a number of clarifications which indicate that, far from preventing Internet crime from being combated, the directive is likely to facilitate this, in particular owing to the transparency requirements to be met by service providers, to administrations' contact points, to the requirements for cooperation between national authorities and to the obligation for Member States to verify the lawfulness of the activities of service providers established on their territory. In addition, the Council has incorporated the Parliament amendment pointing up the importance of codes of conduct as regards protection of minors and human dignity.

Regulated professions: Reflecting a concern voiced in one of Parliament's amendments, the common position points out that the directives in this area will continue to apply. In addition, the wording of Article 8 has been clarified and the implementing powers conferred on the Commission in this field have been deleted.

Pharmaceutical products: The common position does not affect the Community's existing legal framework for the distribution and advertising of medicines. That framework lays down strict rules at Community level, in particular for the sale of medicines to the public. The problems raised by the sale of medicines over the Internet concern relations with third countries above all. A Community-level working party made up of Member State representatives has been set up to look into the possible need to adapt some of the existing directives in this area. Lastly, it should be pointed out that, if necessary, the country of destination may act on public health grounds.

Fixed book prices: Electronic commerce impacts on the book market in the same way that it does on the market for any other product which is saleable on the Internet. The directive as such has no bearing, however, on the application of fixed book price schemes introduced in some Member States via legislation or by arrangement between the parties concerned. Furthermore, such schemes are not intended to be applied to retail sales to an end consumer by operators established in Member States other than those in the countries concerned.

6. APPROVAL OF THE COMMON POSITION UNAMENDED

Your rapporteur proposes that Parliament approve the common position unamended, and thus adopt the directive, for the following reasons:

1. The common position maintains a proper balance: On all the issues addressed by the directive, the common position has maintained the balance between the various objectives of general interest and between the various interested parties. Parliament's position at first reading played a vital role within the Council in preventing that balance from being jeopardised. Accordingly, except for a new derogation in respect of the validity of real-estate contracts, the directive has added no major derogations to the annex, which makes provision for exemptions from the home country principle. The enacting terms on consumer protection have been maintained, indeed even strengthened. The section on the liability of intermediate providers is covered by a

host of explanatory recitals, and involves a few presentational improvements, without altering the balance of the original proposal.

2. Urgency: As was stressed by Parliament at first reading and by the Cologne European Council, this directive must be adopted as soon as possible to make sure that e-commerce can genuinely develop in the Community. The Council's intensive and prompt work was facilitated by the fact Parliament had itself set an example, at first reading, by giving this legislation priority. Several factors make for urgency in this instance. In view of the globalisation of the economy and competition from US firms, the legal framework of the internal market, which seeks, as with the Internet, to establish an area without internal borders, is one of the Community's few assets in terms of competitiveness of European firms. In addition, in the light of the very swift technological and market-related developments, it is essential to establish fundamental legal principles, thanks to the directive, on the basis of which e-commerce can develop, while leaving enough flexibility to allow interested parties to draw up codes of conduct. The directive will also be a vital factor in prompting European small and medium-sized enterprises and microbusinesses to embark on frontier-free commerce without delay. In many instances at present, such firms are deterred by the legal and financial risks surrounding such activities because of the lack of a clear legal framework at European level. Moreover, several Member States are already legislating in this area and are waiting impatiently for the directive to be adopted. Lastly, prompt adoption of the directive will make it possible to strengthen the Community's position in international discussions and negotiations on e-commerce, in particular at the new round of GATS negotiations on services.
3. Review clause: Article 21 of the common position allows for the very dynamic e-commerce environment by stipulating that the Commission must submit the first report on the application of the directive - accompanied, where necessary, by proposals for revision - three years after it is adopted. This means that Parliament will have an opportunity, during this term, to play a full part in the process of revising the directive. The review clause refers to a number of questions which will have to be looked into, including the liability of hyperlink providers. In three years' time - in the light of developments in technology, on the market and in case law - the Commission and Parliament will have more analyses at their disposal, and will have gained greater experience, so as to identify the problems and find the appropriate solutions.

In conclusion, given this urgent need for fast action and the concern to ensure that the balance which has been struck remains intact, it seems expedient for Parliament to adopt this directive itself rather than seek improvements which might well block or, at the very least, delay its adoption.

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