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de Cock Buning, M.; Hondius, E.H.; Prins, J.E.J.; de Vries, M.

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Madeleine de Cock Buning, Ewoud
Hondius, Corien Prins and Marc de Vries

Consumer@Protection.EU. An Analysis of
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ABSTRACT. The Internet and electronic commerce have emerged as the emblems of a worldwide virtual economy. Although it is yet difficult to grasp all the repercussions of the borderless world of the Internet, it is certain that to shop in this world is different from shopping in the world as we knew it ten years ago. Obviously, the new developments affect the traditional framework of European and national consumer law and the perspectives that underpin this body of law, for most consumer law was established at a time when the Information Society was an unknown phenomenon. Underlining the importance of this issue, the European Council asked the Commission to examine existing consumer law in the Community in the light of the new conditions created by the Information Society and to identify potential problems and loopholes. A report on background research for this examination was submitted to the Commission in August 2000. The present article is based on this report and provides an account of the main findings, conclusions, and recommendations of the report.

In the early 1990s few consumers had heard of email, Internet, and the World Wide Web. Now, hardly ten years later, these technologies have become institutionalized and commonplace. More and more retailers are setting up their businesses on the Internet, attracting an ever-increasing number of consumers to experience the advantages of shopping in a borderless on-line environment. Consumers are offered convenience, speed, and a global choice in services, goods, and, more importantly, prices.

It is clear that consumers will have a profound role in the unfolding of the Information Society, as one of the driving and catalysing elements in its development. Simultaneously, however, enhanced possibilities to communicate and to do business give rise to legitimate concerns as to the protection of consumers (e.g., in the areas of new marketing techniques, privacy, payment, access to infrastructure, services, and content).¹ These concerns become clear when one reads, for example, a recent report of the US Federal Trade Commission.



On 31 October 2000, the FTC, in conjunction with consumer protection organizations from nine countries, wrapped up the so-called "Operation Top Ten Dot Cons." This year-long enforcement effort resulted in 251 enforcement suits against online businesses and showed that the Internet is far from a safe place for consumers.

Although it is yet difficult to grasp all the repercussions of the borderless world of the Internet, it is certain that to shop in this world is different from shopping in the world as we knew it ten years ago. Obviously, the new developments affect the traditional framework of European and national consumer law and the perspectives that underpin this body of law, for most consumer law was established at a time when the Information Society was an unknown phenomenon.

Policy Background

Various national and international governments, institutions, and organizations have acknowledged the new situation and have taken a keen interest in assessing whether changes need to be made in order to safeguard the level of consumer protection in an on-line environment. Mention must be made of the work of the World Trade Organization² and the Organization for Economic Co-operation and Development (OECD).³ In addition, various consumer organizations have issued recommendations, codes of conduct, and certification schemes, and have taken other self-regulatory initiatives.⁴

As the two key players in developing e-markets, the United States and the European Union have taken various initiatives to strengthen the position of consumers. On 30 June 2000, the US president Clinton signed the "Electronic Signatures in Global and National Commerce Act" into law. In his statement on that occasion, Clinton referred to the 1997 Framework for Global Electronic Commerce and remembered that this Framework also noted that government action "may prove necessary to . . . protect consumers."

In Europe, in its Resolution of 14 May 1998⁵ the European Parliament stressed that a high level of consumer protection constitutes a fundamental right and that consumer rights in relation to the Information Society should be ensured and if necessary adapted to the requirements set out by the new environment. Two years earlier in its Communication of 24 July 1996⁶ the European Commission already identified the issue of consumer protection as one of the priorities, questioning whether the legal framework is in fact still

equipped to function properly. Underlining the importance of this issue, in its Resolution of 19 January 1999 the Council invited the Commission to examine existing consumer law in the Community in the light of the new conditions created by the Information Society, and to identify possible loopholes with respect to specific problems that may arise in this context.⁷ This request was mirrored in the Commission's consumer policy action plan, where it was decided to review the EU legislation with a view to identifying possible loopholes and to propose any supplementary measures deemed necessary. Moreover, (the need for) such review was acknowledged in the Electronic Commerce Directive, adopted in May 2000.⁸

Study on Consumer Law and the Information Society

Research to serve as a background for this review was conducted and a report submitted to the Commission in August 2000.⁹ The present article is based on this research and sets forth its main findings, conclusions, and recommendations.

The different sections of the article closely follow the structure of the report and addresses the following two central issues: (a) preconditions relevant to the individual consumer who conducts a transaction on the Internet (mainly legal protection measures under EU law), and (b) preconditions with a more holistic connotation (addressing "softer issues" such as education and access). This differentiation needs to be made since the legal framework looked at should be considered within its broader context: Statutory measures lose value and justification if they are not complemented by other basic (non-legal) forms of protection (such as security, consumer education, etc.). In the discussion of the first of these central issues, we cluster the relevant topics, as seen from the perspective of a consumer, according to the various phases of the process of concluding a contract over the Internet. Thus, first the pre-contractual phase (mainly concerning the domain of commercial communications) is dealt with. Subsequently, we discuss the contractual phase (concerning the domains of information requirements, general terms and conditions, requirements of form, pricing, and taxation) and the post-contractual phase (concerning issues such as liability and dispute resolution). Finally, we address what we have called "the continuously relevant domains" (i.e., domains that are of relevance throughout the process of concluding a contract, such as privacy and international private law).

We set off, however, with a brief overview of the underlying developments in information and communication technology (ICT) that are having an impact on (consumer) law, and thus try to provide a broad perspective on the consumer protection issues at stake.

CONSUMER LAW IN THE INFORMATION SOCIETY

To an increasing extent our daily life is dominated by information creation and information processing. In fact, our economic behaviour is being informatized, intimating our economy. Simultaneously, people and organizations are losing their traditional physical boundaries and virtual entities are born. Hence, an ambiguous development can be seen with intimation and globalization taking place at the same time. Both have an enormous impact on traditional legal axioms and cause a loss of efficiency of traditional regulatory mechanisms and liaisons. Taking a closer look at these impacts, we note that eight basic consequences are emerging (Prins & van Kralingen, 1997).

Geographic borders are fading away. Electronic communication with foreign computer systems is as easy as communication with a domestic computer system at short distance. Increasingly, the rise of the Information Society will create a world where electronic contact will push aside physical contacts. As a consequence, traditional geographic borders will fade away. Actions related to the conclusion of a contract can be accomplished in many different countries. Where physical characteristics are used as the starting point for the applicability of law, jurisdiction, and enforcement, these delimitations will become increasingly controversial, in particular in the field of consumer protection.

Borders of (and between) entities are fading away. ICT brings with it virtualization of businesses, governments, and people. One-stop shops and public portals providing access to different “traditional” organizations are popping up. Inflexible “physical” organizations are being replaced by dynamic “virtual” organizations which no longer require a physical location in a specific country. ICT increases the opportunities for creating an organizational mix which varies according to the circumstances at a given time. Furthermore, ICT causes virtualization of identities as well. This means that the counterparts of

consumers can emerge in many different forms and identities, establishing uncertainty (e.g., as to the rules applicable to that counterpart).

Societal relationships are changing. Traditionally, consumers have been regarded as information receivers only. However, in the Information Society, consumers actively participate in the information circuit: By selecting and combining data, consumers themselves can become information producers. In addition, it appears that the introduction of electronic markets has an important impact on the gap between strong and weak positions on these markets. The evolution of this gap affects various participants in the market in various ways: electronic commerce can both strengthen and weaken the positions of participants. Developments such as authors now making their book or music public without the involvement of a publishing company (Stephen King, David Bowie) or endeavours such as LetsBuyIt.com that allow consumers to join forces in the bargaining for products, could have an enormous impact on the traditional position of market players. Thus, one could argue that the legal concept of the consumer is becoming blurred.

Concentration of information. Another main consequence of the rise of the Information Society will be the new possibilities inherent in the “chain of information.” Perception, storage, dissemination, and modification of information can be carried out easier and faster and in a more systematic, reliable, and inconspicuous fashion. Obviously this raises many concerns, e.g., in relation to privacy and access to content.

Dematerialization. ICT has a dematerializing effect on processes. Information and software are delivered electronically and not on paper or by some other carrier. Law often relies on physical benchmarks (tangible objects, ownership). Thus, questions arise as regards the legal status of electronic signatures or general terms and conditions that are no longer available on paper.

Decrease of human input. In some cases ICT makes human interference unnecessary. Within the sphere of EDI, decisions are sometimes made or acts are performed automatically. More recently, various forms of agent mediated electronic commerce have been introduced. Examples are agents who shop on the Internet and

find the best bargain (Jango (<http://www.jango.com>), Bargainfinder (<http://bf.cstar.ac.com>), etc.), and electronic marketplaces where agents can buy and/or sell goods. Some good examples of the former are Kasbah, the Fishmarket project, and AuctionBot.

Speed and its impact on terms of trade. Law is based on traditional perceptions of the speed of processes (e.g., to perform an activity or to cover certain distances). Often, law requires a certain lapse of time for the occurrence of certain legal consequences. ICT developments call such terms into question. Not least in the field of consumer law, this is a development which can have a large impact.

Scaling up and scaling down. Due to the almost limitless possibilities of dissemination, the growth of information with an illegal or harmful content can have far-reaching effects. Previously, such problems were typically considered to be national problems. However in the Information Society these can easily become worldwide challenges. Simultaneously, ICT offers the possibility to minimize scales and to fine-tune needs for information to the requirements of users. Broadcast becomes “narrowcast” and user profiles can become the basis for tailor-made information services.

These eight developments rock the EU consumer *acquis communautaire*. Whatever their ultimate effects, for now they justify an in-depth analysis of whether the current level of consumer protection is still sufficient and whether new areas of protection will need to be looked at and addressed. It is this analysis that we embark upon in the following sections.

*Pre-Contractual Phase*¹⁰

When considering pre-contractual issues, the first thing that becomes clear is that the Internet allows for unprecedented commercial communications, in terms of intensity, targeting, and reach. Rules on advertising are in many cases especially aimed at certain types of media. Here we encounter forms of communication aimed at triggering consumers to enter into contracts: commercial communications. Is the present legal framework sufficiently equipped to guarantee consumer protection on the Internet? What new initiatives has the European legislator taken in this regard?

First of all one has to realize that consumers do not expect matters

related to on-line advertising to be completely different from their experiences in an off-line world. The widely acknowledged principle that “what is valid off-line, should also be valid on-line” has to be accepted as a guiding principle. However, off-line rules do not cover all the new technologies of the Internet. Framing, deep linking, the use of so called meta tags provide for information search methods which are unknown in the off-line world. These might call for new approaches in respect of existing law. This also applies to the reliability of information on the Internet and particularly to the borderline between independent consumer information and commercial communications. Also, the role of consumers is less unequivocal in the Information Society. Firstly, as mentioned in the previous section, the classical distinction between consumer and producer is becoming blurred. Consumers (and consumer groups) are offering on-line goods and services in an increasing degree. Secondly, one can also question whether the Information Society consumer is a better informed (and more emancipated) consumer than the off-line consumer.

The existing body of European material law on commercial communications consists of the relevant primary rules of the EC-Treaty itself and the accessory decisions of the Court, as well as the more specific European rules on advertising and marketing. The last category could be divided into several different kinds of rules: general rules, pertaining to all forms of advertising;¹¹ rules which are restricted to certain media;¹² rules which are restricted to certain products;¹³ rules which are restricted to certain services;¹⁴ rules which concern certain target groups;¹⁵ and rules which concern certain advertising tools.¹⁶

This body of law is actually rather small. Notably, there exists only one general directive. This incompleteness is particularly striking when it comes to specific marketing methods such as promotional offers, lotteries, and competitions. Specific regulation for advertising directed at children, sponsoring, product placement, and the like is only to be found in the TV Without Frontiers Directive (“TVWF-Directive”).

The Concept of Commercial Communication in the Information Society

What should be the scope of advertising regulations in the Information Society? Should they, as it has been till now, be specific and adapted

to the particular circumstances of the medium or the product, hence implying the need to develop a separate concept of commercial communication, adapted to the on-line world? Or should there be only one concept, applicable to both an on-line and an off-line consumer? In answering this question, both the specific features of advertising on the Internet and the general principles of advertising law must be taken into account.

Article 2 (f) of the Directive on Electronic Commerce contains a technology-neutral definition of commercial communication. It is defined as: "any form of commercial communication designed to promote, directly or indirectly, the goods, services or image of a company, organization or person pursuing a commercial, industrial or craft activity or exercising a regulated profession." Information providing access to the activities of companies, organizations, or persons (domain names or electronic e-mail addresses) is not considered as commercial communication under this directive, as it does not cover communication relating to goods, services, or the image of the company, organization or person when it is compiled in an *independent* manner, and especially so when it is not done for commercial reasons.

An important issue is of course whether a Web site can be considered a commercial communication in the meaning of this definition. A recent decision by the Court of Appeal in Rennes (France) gives a rule of conduct. The Court held that a Web site on which a bank offered credit solutions accompanied by examples of the financing of purchases and a page of advertising for a credit card had to be considered a commercial communication. As the site was aimed, not only by its very existence but also by its content, at promotion of the commercial activity of the bank and attractive presentation of credit contracts, it was considered a commercial communication.¹⁷ As this decision indicates, the concept of commercial communication seems suitable also for the on-line world: The essential criterion of an advertising vehicle is that it can carry an advertising message, whatever form it takes.¹⁸ This is so not least because a consumer would not expect the concept of commercial communication to have a different meaning in different media. This expectation could indeed serve as a reason for creating a unified concept of commercial communication in the secondary law of the European Union.

Consumer Needs in the Information Society

Given the scope of commercial communication in the E-Commerce Directive, we now turn to the needs of consumers in an environment such as the Information Society. What are the consumer's essential needs when it comes to commercial communications? The following would seem to cover most of the spectre: (a) the need for correct information about relevant features of products and services; (b) the need for easily accessible information and access to search methods that will lead to useful information; (c) the need to be able to recognize the nature of the information, i.e., whether it is commercial or originates from independent sources; and (d) the need for protection against unsolicited and obtrusive commercial messages (so-called "spamming").

Correct information about relevant features of products and services. Consumers have a strong need for correct information about relevant features of products and services. Several European directives contain provisions to that end. The Distant Selling Directive contains a provision to ensure that the consumer will be informed properly (e.g., about the identity of the supplier, the main characteristics of the goods and services, the price of the goods and services, etc.) before conclusion of any distant contract.¹⁹ In advertising law misleading information is covered by the Directive on Misleading and Comparative Advertising and by directives concerning specific products or services.

Misleading advertising. National cases in various Member States on misleading advertising on the Internet indicate that a broad concept of misleading advertising is the perfect tool for attacking misleading practices. Without doubt, the same holds for European law on misleading advertising. The definition of advertising is so wide that one could almost speak about a directive on misleading marketing practices (Howells & Wilhelmsson, 1997, p. 136). Even individual, non-public statements made by the seller in connection with the conclusion of a contract are covered. Since directives on special products or services do not exclude the applicability of this general directive, it is arguable that its field of application is really comprehensive and easy to use as an instrument for suppressing misleading commercial statements of every nature and with respect to any medium.²⁰

The recent case law of the European Court of Justice with examples such as Pall, GB-INNO, Clinique, Nissan, and Sucrandel²¹ provides us with a balanced interpretation of the concept of misleading advertising. Whereas it is not possible to do without a general concept of misleading advertising, given the flexibility of advertising itself, it is recommendable to look for mechanisms by which the interpretation of the Court in cases of transborder advertising should also be valid in purely national cases. One of these mechanisms would be a maximal harmonization of the Directive on Misleading Advertising, in the same way as comparative advertising is treated.

Comparative advertising. In the Internet environment comparative advertising can be a very useful tool for gathering information about products and services. The Directive on Misleading and Comparative Advertising contains exceptions to the rule that comparative advertising shall be permitted.²² These exceptions permit Member States to maintain or introduce bans or limitations on the use of comparisons in the advertising of professional services. As the Internet is a very suitable medium for providing detailed and correct information about professional services – and in fact is already used for that purpose – the existing provisions should be reconsidered.²³

Directives concerning specific products or services. Public advertising for medicinal products that are available only on a doctor's prescription²⁴ is restricted and in many cases banned in the off-line world, as are advertising and sponsorship of tobacco products. In both cases the question may arise whether the *establishment* of a Web site containing information about tobacco products or medicinal products is in itself a contravention of these bans on advertising.²⁵ To avoid different interpretations of these two bans, some European guidelines are needed, since – generally speaking – consumers benefit from correct and relevant information on subjects such as tobacco and medicine. The information provided on Web sites should in any case be objective and correct. The health risks inherent in Web prescription of drugs and medical advice that is (automatically) given on the Internet, without professional intervention, are substantial.²⁶ Consumers should be protected from such health risks. Since health is a predominant consumer interest, serious consideration has to be given as to whether there is a need for public legislation to regulate medical advice on the Internet. A sharp borderline between editorial and commercial communication is indispensable.

Promotional offers. Another subject that has a clear link to existing public law in several Member States is the legislation with regard to promotional offers, such as premiums and lotteries, for commercial purposes. With regard to on-line promotional offers, only the Directive on Electronic Commerce contains a provision about mandatory information to be provided with respect to such offers.²⁷ As a consequence of the country-of-origin principle in the Directive on Electronic Commerce, promotional offers can be provided through the Internet to *all* Member States irrespective of whether the legislation of these states carries restrictions on promotional competitions, games, lotteries, etc. This must be expected to have a negative impact on the standards of consumer protection in those countries.

Easily accessible information. Typical (and important) elements of Web advertising are methods of searching for useful information. The way in which some advertisers try to lure consumers to their Web by abusing meta-tags, links, framing and the like, deserves special attention. Easy access is very important for consumers. Their civil right, the freedom to gather information, is simply endangered if their access to information is blocked or otherwise diverted.

Hyperlinks provide consumers with a very effective search technique on the Internet, and may even function as a sort of comparative advertising. However, unfair competition law and intellectual property law prohibit some linking methods.²⁸ Mere hyperlinking is not considered as an unlawful use of a trademark or a company name. A clear expression of opposition to hyperlinking on a competitor's Web site may be a legally effective means to exclude hyperlinking to that Web site. Deeplinking (linking while bypassing the competitor's home page) could be prohibited if by deeplinking the false impression could be evoked that the page which appears belongs to the original Web site. As far as framing is concerned, it is accepted that the owner of a Web site that is being framed can easily be given recognition in a statement of his or her authorship on the quoted page. This means that framing will in itself not normally be considered as an act of unfair competition. The use of meta tags could constitute infringements of trade mark law, unless the use of the trade mark could be considered as lawful editorial use. In conclusion, these issues can be addressed under the current unfair competition law and intellectual property laws.

Recognizable nature of the information. It is of key importance that consumers are cognizant of the nature of the information they are confronted with. Is the information commercial or does it originate from independent sources? Since Internet is a medium that leads to a convergence of all sorts of media such as newspapers, film, telephone, broadcasting, and databases, the borderline between editorial and commercial communication on Web pages is often blurred. The identifiability of the classical media is absent on the Internet.

European law contains, except for television, no specific rules on the borderline between editorial and commercial communication. This field is largely covered by national and international self-regulation.²⁹ As a general rule, commercial communication should be recognizable as such. This principle has been laid down in the Directive on Electronic Commerce.³⁰ Also in the Distant Selling Directive, the supplier of goods and services is obliged to make clear what the commercial purposes of the information on his Web site are.³¹ However, the way in which companies have to distinguish commercial information from objective information remains undefined. This applies to sponsorship, too. Since on the Internet it is rather difficult for consumers to establish whether they are dealing with objective information or information that has a commercial nature, extra safeguards are needed as to the identity of a sponsor of a site.³² Clear rules are thus required which oblige the sponsor to identify himself. Under the Directive on Electronic Commerce, the natural or legal person on whose behalf a commercial communication is made, has to be clearly identifiable.³³ However, so far it is not clear whether the sponsoring of an Internet site has to be considered commercial communication within the meaning of the Directive on Electronic Commerce.

In the analogue world, the TVWF Directive contains a specific provision for children.³⁴ The underlying principle of this provision is that TV commercials may not cause moral or physical damage to children. To this end, TV advertisements may not incite children or their parents to buy the products, may not show children in dangerous situations, etc. Since the TVWF Directive is formulated in a medium-specific way it can be directly applied only to TV commercials. If this provision were to be reformulated to include all commercial communications, it could be a very useful point of departure for regulation of on-line advertisements. At this moment some

effort is also being made by the IAP³⁵ to implement self-regulation among advertisers throughout the EU.

Unsolicited and obtrusive commercial messages. Unsolicited commercial e-mail, also known as “spamming,”³⁶ is a growing problem on the Internet. By sending spam mail the advertisers transfer the advertising costs to the consumer who spends (valuable) time reading the e-mails. The question of the legality of spam mails is not yet settled. In the Directive on Distance Selling, prior consent of the consumer is required with regard to the use of automatic calling systems without human intervention and to the use of fax machines for distance communication, so-called “opt in.”³⁷ With regard to other means of individual distance communication, such as spam mails, the Member States will have to ensure that these can be used only when there is no clear objection from the consumer, a so-called “opt out.” It should be noted that this directive refers only to distance selling; not all spam mail will be sent with this particular purpose in mind.

In the Telecom-Privacy Directive, the use of automatic calling systems without human intervention or fax for the purpose of direct marketing is allowed only when subscribers have given their prior consent (opt in).³⁸ For means other than automatic calling or facsimile, the Telecom-Privacy Directive allows the Member States to choose between an opt out or an opt in system. So far, it is unclear whether spam mail can be squeezed into this last category. Recently, the Commission has taken an initiative to clarify this situation.³⁹ In its proposal for a directive concerning the processing of personal data and the protection of privacy in the electronic communication sector, electronic mail for direct marketing purposes other than at the request of a subscriber will be covered by the same type of protection that exists for automatic calling systems and faxes. The Commission thus proposes a harmonized opt in approach that is technology neutral. From a consumer protection point of view, this is a sound approach.

The Directive on Electronic Commerce contains a special provision about unsolicited commercial communications by e-mail.⁴⁰ However, this provision does not solve the problem of unsolicited e-mail unequivocally. It leaves the choice between opt out and opt in to the discretion of the Member States. In any case, spam mail should be clearly and unambiguously identified. At the same time it states a specific obligation for the Member States to use so-called Robinson lists or opt out registers. Service providers are required to check

these registers regularly and to respect consumers who have registered their preference not to receive spam mail.

CONTRACTUAL PHASE

Over the last decade, the European Union has adopted a number of consumer protection measures that relate to the formation of contract. Directives such as those on Door-to-Door Sales, Package Travel, and Unfair Contract Terms have come about in an era when most contracts were still concluded in the traditional way: orally or in writing, in person or by way of correspondence. It is therefore natural to examine whether they still serve their purpose in a paperless society.

When a consumer enters into an electronic contract with an enterprise, there are several points on which his position differs from that of the traditional consumer. First, he usually has less information about the enterprise. Second, consumer protection measures increasingly impose form requirements. How are these to be met in a paperless society? Third, under modern legislation on unfair contract terms, general terms and conditions are nowadays often brought to the consumer's attention. How is this going to work out on the electronic highway? Finally, a nightmare for worrisome consumers is electronic payment. To what extent will the enterprise – and outsiders – be in a position to abuse the consumer's payment order?

We will look into the extent to which the various consumer protection directives are "Information Society-proof" with respect to each of these four points. The directives dealt with in this section are the Door-to-Door Sales Directive, the Electronic Commerce Directive, the Distance Selling Directive, the Privacy Directive, the Timeshare Directive, the Package Travel Directive, the draft Financial Services Directive, the Sale of Consumer Goods Directive, and the Directive on Indication of Prices.

Information

Understandable information. There are two concerns with regard to the intelligibility of information. First, the language of electronic information itself and the form it takes may not always be comprehensible to the ordinary consumer. Second, the information is not always available in the consumer's own language.

The first concern is not addressed very adequately in the present directives. The Directives on Unfair Contract Terms and on Consumer Sales and Guarantees do contain a provision which requires terms to be plain and intelligible. But what “plain” and “intelligible” really means remains to be seen. One solution is to provide for a procedure which will lead to plain and intelligible terms, for instance negotiations between on the one hand a body representing consumers and on the other the enterprises. In the United Kingdom, the Office of Fair Trading has been successful, in negotiations with trade and industry, at developing codes of conduct and general contract terms which are more easily understandable to consumers. Note, though, that consumer representatives are sometimes reluctant to depart from the precise legislative text for fear that the more intelligible text will be less consumer-friendly than the legislation.

An added concern in the Information Society is the bulk of information which trade and industry may make available. At first sight, it would seem to be an advantage that so much information can be provided to consumers. However, the more voluminous the information, the more difficult it gets to choose the relevant information.

The second concern pertains especially to the Unfair Contract Terms Directive. This directive is unclear as to the language in which the terms have to be drafted. It is advisable that the solution of Article 6 (4) of the Consumer Sales and Guarantees Directive⁴¹ be applied to the Unfair Contract Terms Directive.

Identity of the other party. Article 4 of the Distance Selling Directive requires the supplier to reveal his or her identity prior to the conclusion of the contract. In case payment in advance is required, the supplier should also provide his or her address. This appears to be insufficient in the case of electronic transactions. Here, contact details and registration numbers should be given, in order that consumers may start complaint procedures or establish other forms communication. The Timeshare Directive, the Package Travel Directive, and the draft Financial Services Directive should be supplemented in the same manner.

Price. Under Article 3 of the Directive on Indication of Prices, the selling price and the unit price should be indicated for all products referred to in Article 1. According to Article 4, the selling price and the unit price must be unambiguous, easily identifiable and clearly

legible. Other directives contain similar provisions, which on the whole seem Information Society-proof. However, one should not lose sight of the fact that electronic transactions are increasingly taking place across borders. This raises the question of the currency of payment. Due to the forthcoming introduction of the Euro, the problem is less pressing but still exists. Likewise there is a problem with price comparisons. The Recommendation on electronic payment instruments may serve as an example of how to solve this question.

Product or service. Article 4 of the Distance Selling Directive and Article 3 of the draft Financial Services Directive require the supplier to inform the consumer as to the main characteristics of the goods and services to be provided. What these main characteristics are remains unclear, since there is very little case law on this matter, also in the off line world. In the digital world, the question arises whether or not a digital picture of the product is sufficient to fulfil the requirement. Other directives show similar gaps. The one text which provides a more encompassing requirement is Article 17 of the draft Directive on Universal Service and Users' Rights relating to Electronic Communications Networks and Service. This may serve as an example for other directives.

Procedure of concluding the contract. The Electronic Commerce Directive deals, in Article 11, with the procedure for concluding a contract. The provision does not cover every situation; the situation where the consumer makes an offer is excluded. More importantly, this provision has been substantially watered down compared to the originally proposed text. No longer is the service provider required to send an acknowledgement of receipt. On several points the OECD guidelines may serve as an example for how these provisions can be upgraded.

Data processing. Articles 10 and 11 of the Privacy Directive require consumers to be informed about the processing of their personal data. This point will be taken up below.

Security policy. It has been argued that consumers are usually not interested in security issues. We are of the opinion that electronic payment and the transmission of privacy-sensitive data are important questions. Consumers should be informed about them. There are

large lacunae in this area. Two exceptions are Annex II of the Electronic Signature Directive and Article 4 of the draft Directive on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector.

Complaints procedures. Information to consumers about complaint procedures is dealt with in a fragmented way. This may be explained by the changing policy of the EU with regard to extra-judicial settlement of claims. Two decades ago this was still considered to be a monopoly for the courts. At present, out-of-court procedures are looked upon much more favourably. This should be reflected in directives. Article 17 of the draft Directive on Universal Service and Users' Rights relating to Electronic Communications Networks and Service provides a useful example.

Cancellation. Some directives give the consumer the right to cancel the contract within a certain time. Most explicit on this point are Article 6 of the Distance Selling Directive and Article 3 of the draft Financial Services Directive. Less explicit is the Timeshare Directive, which in its annex requires the enterprise to inform the consumer. The right to cancel a package travel when the package is altered significantly is only implicit. This directive contains no information requirement in such a situation and therefore does not provide consumers, on-line or off-line, with sufficient protection. It is not Information Society-proof.

Form Requirements

Hastily taken decisions. Requiring consumers to sign a contract often serves as a means of averting hastily taken decisions. Imposing a form requirement has not always been effective, as may be seen from the experience with Articles 1341 and 1342 of the Italian Civil Code. Requiring consumers to sign specific contract terms deemed especially dangerous has never deterred Italians from entering into such contracts.

It is therefore perhaps not surprising that EU directives do not lay down any traditional form requirements. Several directives however have a functional equivalent in that they allow the consumer to withdraw from a contract within a short period. We find such "cooling-off" provisions in the Distance Selling Directive, the Timeshare

Directive, and the draft Financial Services Directive. At first sight, these provisions seem to be Information Society-proof.

Evidential position and legal uncertainty. Some directives provide for information to be given to the consumer in writing. This is, for instance, the case with the Timeshare Directive's Article 3 (1) and the Package Travel Directive's Article 4 (1). There seems to be no argument against allowing writing to take electronic form.

General Terms and Conditions

Fair terms. There is now abundant legislation on unfair contract terms in all EU Member States, at present based mainly on the Unfair Contract Terms Directive, but in the future also on the Electronic Commerce Directive and the draft Directive on Universal Service and User's Rights. An analysis of the directives makes clear that the issue of fairness will change focus in the Information Society, but also that the Unfair Contract Terms Directive provides sufficient scope to deal with these matters.

Understandable terms. A more open question is the extent to which the Information Society will require more comprehensible terms. Under Article 5 of the Directive, general terms must be drafted in plain and intelligible language. This applies even to terms defining the main subject matter and the adequacy of the price. In case of doubt, the interpretation most favourable to the consumer will prevail. A question which this Article raises is whether regard should be paid to the specific knowledge of the consumer at hand (subjective test) or consumers in general (objective test). The answer to this question is not apparent from the Directive. Traditionally, the distinction may not be that decisive, but in the Information Society there is a clear division between those who know all and those who have no idea. The division has to do with age, but also with poverty. Therefore it seems necessary that the question be settled.

Access to terms. Consumers, for various reasons, should have access to the general terms and conditions which apply to their contracts. These terms may provide them with guidance as to what to do, for instance, in the case of an insurance contract information about the

time limit within which the insurer must be notified about an accident. The Internet makes general contract terms better accessible and can be provided faster. This raises the question whether the user should be required to provide the terms to the consumer as soon as possible. Not always does the Internet work to the benefit of the consumer, for terms may become less accessible by their sheer length. This may render them “unclear” under the directive, but whether this is so requires clarification.

Payment

There is consensus between trade and industry and consumers that a safe payment system is indispensable for successful development of e-commerce in business-to-consumer transactions. This should be reflected in EU rules, but is not the case at present. There is another development caused by the emergence of the Information Society, however: Consumers are increasingly required to pre-pay for the goods or services they demand. This pre-payment deprives consumers of all the leverage they would have had without payment. It also opens them up to the risks of insolvency, fraud, litigation, etc. On this point, the EU will have to step in to protect consumers. In particular, consumers deserve charge-back rules, which would enable them to have the pre-paid money transferred back upon demand, not only in the case of fraud, but also where they avail themselves of the right of withdrawal. The OECD guidelines may in this regard serve as a useful precursor.

Conclusions

The provisions on formation of contract in the various consumer protection directives of the European Union are, at first sight, well adapted to the Information Society. A closer look, however, reveals various deficiencies. Some of these may be remedied by interpretation by the courts. Others are in need of legislative correction. The European Union should therefore strive towards a speedy adaptation of its consumer protection directives.

POST-CONTRACTUAL PHASE

Once a consumer has concluded a contract and has thereby stepped into the world of electronic transactions, he or she enters the post-contractual phase. Basically, two issues are to be dealt with at this point: liability and out-of-court dispute resolution.

Liability

Consumers may face liability issues at various stages in the transaction process. Prior to the conclusion of a contract, liability may result from an unlawful commercial communication or the use of personal data that violates relevant rules, and consumers may be held liable for the misuse of payment card details. Once the consumer has agreed to a contract and purchased something on the Internet, liability problems may arise in relation to on-line delivery of the product (software, information, music etc.).⁴² It is this latter issue that we will discuss in this paragraph. Obviously, the crucial question to answer here, is whether “something delivered on-line” can be regarded as a product, thus falling under the scope of the Product Liability Directive.⁴³ As is well known, the status under this Directive of informational commodities, such as software, has been fiercely debated in the legal literature. To date, no final answer has been given, partly because the European Court of Justice has not shed light on the question to what extent the term “product” limits the scope of the Product Liability Directive.⁴⁴

In the event that one comes to the conclusion that on-line delivery of software, music, and information does not fall under the scope of the Product Liability Directive, the question is whether there is a need for additional legislative measures. In this context, it is important to remember that in 1990 a Council directive on the liability of services,⁴⁵ to be complementary to the Product Liability Directive, was submitted by the Commission. However, this initiative failed to make it to the finish, thus leaving one area uncovered. For the purpose of our discussion, it is useful to look at the arguments that were used to block the service liability directive. Some justified the distinction made between goods and services with the argument that services are more “individualistic,” creating a more personal tie between the provider and the consumer. As opposed to products, the quality of services would be more dependent on the individual perception of

the consumer, making it less objective to assess whether a service provided corresponds with the expectation of the consumer. This argument does not seem defensible in respect of on-line delivery of information, music etc., since such ties do not exist here. On the contrary, we see mass production and sales of digitalized products, with no real interaction between the provider and the consumer.

Secondly, some people argued that services lack a Community edge, since the provision of services are much more locally bound. Again this argument loses validity in the Information Society, where the provision of on-line products is *qualitate qua* not limited in terms of geographical area, and where effects of product failure (viruses, privacy infringements) may be felt throughout the EU (and beyond). Directive on Universal Service and Users' Rights relating to Electronic Communications Networks and Service.

If one comes to the conclusion that on-line delivery of "products" such as software, information, and music cannot be regarded as products, it seems fair to say that the above-mentioned arguments for excluding services do no longer apply in the Information Society. Thus, the establishment of service liability legal framework would be in line with the consumer protection sought within the EU. In the event that one reaches the conclusion that on-line delivery of products does not necessarily fall outside the scope of the Product Liability Directive, at least an express acknowledgement of this fact is needed.

For now, it appears that there is a distinctive need to regulate liability issues in connection with on-line delivery of informational commodities and that it should be dealt with in a separate directive (as opposed to amending the Product Liability Directive). At present, the Product Liability Directive is under review by the Commission, but it seems that the on-line service aspect will not be taken on board (the underlying Green Paper touched only briefly upon it). For this reason it must be assumed that clarification of the liability for on-line services should be launched as a separate initiative.

In addition to the Product Liability Directive, we briefly touch upon a second directive relevant to the liability for consumer transactions: the Sale of Consumer Goods Directive.⁴⁶ As is the case with the Product Liability Directive, this directive contains a provision determining its applicability that seems hard to apply in the Information Society. According to Article 2(b) a consumer good shall mean "any tangible movable item, with the exception of water and gas and electricity." On the other hand, the recitals state that "opportunities

available to consumers have been greatly broadened by new communication technologies which allow ready access to distribution systems” and that “the development of the sale of goods through the medium of new distance communication technologies risks being impeded.” The combination of this Article and the recitals is quite confusing. However, the explicit reference to tangibles and the exclusion of electricity seem to lead to the conclusion that on-line sale of commodities such as information, software, and music seem to fall outside the scope of the directive, thus not imposing any liability (by virtue of this directive) on the provider. The situation will get even more complicated in light of the adoption of the Electronic Commerce Directive. According to Recital 11 of the Electronic Commerce Directive, the Sale of Consumer Goods Directive applies in its entirety to Information Society services. Does this mean that the Electronic Commerce Directive has enlarged the scope of the Sale of Consumer Goods Directive? Whatever the answer may be, it is beyond doubt that the applicability of the Sale of Consumer Goods Directive in the Information Society requires clarification, particularly in view of the adoption of the Electronic Commerce Directive.

Out-of-Court Dispute Resolution

One of the key characteristics of electronic consumer transactions is the absence of face-to-face contact: The consumer’s counterpart is not physically present and may be located in another Member State or even outside EU territory. This triggers the discussion on consumers’ access to justice in case of a dispute with on-line sellers of goods and services. The position of the consumer is weakened because there is often a large discrepancy between the damage suffered by the consumer and the costs involved in obtaining redress. In an electronic environment, consumers are generally required to pay the full sum in advance. It is also quite complicated for consumers to find out where to lodge complaints, within which terms, etc. Nevertheless, the notion that at the end of the day a consumer may not be able to actually redress any shortcoming of his counterpart will critically affect the growth of electronic network transactions, and, in a broader context, the sound development of the Information Society.

A glance at the relevant European rules shows that there are hardly any Community rules on consumer dispute settlement. In principle, the EU-Treaty does not provide a legal basis, which means that the

establishment of rules on access to justice has been left to Member States.⁴⁷ However, within the boundaries of this constraint, improving access to justice for consumers has been the goal of the Commission for a long time. The Commission has launched many initiatives which have greatly contributed to the development of ideas and policies at national and international levels. During the last ten years, in line with the development of the Internal Market, the Commission's policy has been aimed at addressing access to justice in relation to cross-border litigation. In this context the Green Paper⁴⁸ (1993), the Action Plan,⁴⁹ and the Consumer Access to Justice Resolution,⁵⁰ were produced. More recently, the Commission explored the possibilities of alternative (out-of-court) dispute resolution. This culminated in a Communication⁵¹ from the Commission on the out-of-court settlement of consumer disputes and the 1998 Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, contained therein. The Recommendation sets out a number of minimum guarantees that the bodies should offer to their users. These minimum guarantees materialized in the form of seven "principles" – independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation – with which the out-of-court bodies should comply.

The initial proposal of the Electronic Commerce Directive (Article 17) followed the principles of the 1998 Recommendation and would have made it compulsory for the Member States.⁵² Also, Article 30 of the July 2000 draft Directive on Universal Service and Users' Rights relating to Electronic Communications Networks and Service refers to the 1998 Recommendation.

Neither the Communication nor the Recommendation make specific reference to the Information Society. Nevertheless, they avail themselves of recommendations for actions that clearly indicate and stimulate the use of the Internet in establishing mechanisms and systems for out-of-court settlement of consumer's disputes. However, the policy documents do not cater for specific issues related to the out-of-court settlement using global networks (on-line out-of-court dispute settlement), and some specific attention may need to be paid to the peculiarities that will be triggered by using the Internet in the process of settling consumers' disputes (e.g., admissibility of electronic proof, real-time court hearings, etc.). In this context, it should be noted that on-line out-of-court dispute settlement may alleviate the strict choice in favour of consumer protection that is contained in, e.g., the draft

Regulation on Jurisdiction with respect to Companies, but at the same time present an attractive solution for consumers as well: Disputes can be settled entirely over the Internet, allowing both parties to stay in their own countries and even at their homes/businesses. Some projects are already up and running,⁵³ but it is important to further stimulate such initiatives for cross-border consumer dispute settlement and grant a supportive role to consumer organizations in establishing these schemes as well as standing by the consumer in actual "e-mediation." It should, however, be made clear that in the end access to justice under the Brussels Convention should remain the safety net. Alternative dispute resolution (ADR) should not be a substitute for the Brussels Convention.⁵⁴ Recent developments in the European Parliament indicate that this fear is real: It almost adopted a proposal containing a trade-off between access to justice and ADR.

The key reason for the conclusion that ADR can *not* be a substitute for access to justice under the Brussels Convention is that on-line ADR for electronic commerce purposes has not yet been tested. Thus one should not be overoptimistic about the benefits this type of ADR may bring. For the very reason that on-line out-of-court dispute settlement seems at this moment to be a universal panacea, some kind of caution is called for. The major problem in setting up an ADR system is where to resolve the dispute. How do consumers access the cyber tribunal? There are a lot of issues that need to be worked out and the Commission, by necessity, will have to come up with high level principles.

CONTINUOUSLY RELEVANT DOMAINS

Above we have analysed issues that are of relevance at a particular stage of the consumer's electronic buying process. In this section we discuss two domains that are relevant in all three phases dealt with so far: These domains concern: privacy and international private law.

Privacy

It has often been stated that privacy protection is a critical prerequisite for the growth of electronic commerce. It appears, however, that consumers harbour strong fears with regard to their online privacy.

In 1998, *Business Week* reported that consumer' worries about the protection of privacy on the Internet is ranked as the foremost reason for non-use of the Internet.⁵⁵ In the meantime, several reports conclude that with on-line profiling techniques, on-line consumers do not, in effect, have the same degree of privacy protection as off-line consumers. As always there are conflicting legal interests at work here. Identifying consumers on the Internet poses a significant threat to personal privacy. On the other hand, in many instances businesses and organizations on the Internet have a justified interest in authenticating the identity of their counterpart. For this reason, various Internet techniques convey the authority to require identification of consumers and, for purposes of assuring the quality of those identities, impose authentication requirements. A more controversial issue is to what extent businesses may gather data on consumers and their transactions for marketing purposes.

The key question is which privacy standard consumers may reasonably expect in a cross-border on-line environment? Several guidelines are worth mentioning here. First, there are the well-known international principles guaranteeing the privacy of personal data, introduced two decades ago by the Council of Europe Convention and the OECD-Guidelines.⁵⁶ Subsequently, the European Privacy Directive and most national data protection laws adhered to these very same principles. The importance of the principles in relation to consumer protection was stressed once more in the 1999 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce.⁵⁷ Second, mention must be made of the decisions of the European Court of Justice. Among others is the *Liidi Case* in which the European Court of Justice introduced the criterion of "reasonable expectation of privacy."⁵⁸ Looking at the situation in the European Union, we note that a rather comprehensive legal system with respect to the processing of personal data has been introduced. The above-mentioned principles for fair information practices underlay the respective provisions that have been introduced with the Privacy Directive and the Telecom-Privacy Directive.⁵⁹ As a result, the directives contain a rather broad set of provisions that apply to situations in which personal data of Internet consumers are collected. From a normative perspective, both of the present directives provide the necessary tools to safeguard the rights of on-line consumers.

However, day-to-day practice shows that there is a considerable lack of transparency as to who collects which personal data about con-

sumers on the Internet. Whereas in the off-line world, consumers are usually aware of the fact that their personal data are collected, in the on-line world invisible data processing applications such as automatic hyperlinks to third parties, cookies, electronic monitoring and scripting techniques, etc., leave so-called click trails of which consumers are unaware. Especially children will not be aware of the "sensitive" data they may provide in an Internet environment. It will also be easier to persuade them to give away certain data. Neither directive deals specifically with the on-line collection and use of personal data from children. However, developments show that urgent action needs to be taken. In this respect, the United States has set an example with the Children's On-line Privacy Protection Act.

In certain situations, the directives require that the consumer has unambiguously given his consent to on-line businesses in order for them to be able to lawfully process the consumer's personal data. The realities of Internet, however, leads to a situation in which data are usually processed for the purpose of the application of the technique itself. The Working Party of Data Protection Commissioners under Article 29 Directive has already stressed the problem of invisible and automatic processing of personal data on the Internet performed by hardware and software. Furthermore, the question arises whether the definitions in the directives suffice considering the realities of Internet. Especially the Telecom-Privacy Directive appears not to extend to new developments in electronic communication services and technology. Article 6 on traffic data, if interpreted strictly, refers to traditional voice telephony only, but not to use of the Internet. And how do the directive's provisions on applicable law work out in an electronic world without boundaries? Overlapping jurisdictions appears to be a serious problem which leaves the consumer in a state of uncertainty. Also, with what national authority do controllers of Internet-related data processing activities register these activities?

We must therefore conclude that several of the provisions introduced in the directives appear less effective in an Internet environment. What is more, with electronic commerce, data processing has become a global issue. Without a worldwide comprehensive approach to the protection of consumers' privacy rights, the privacy standards in Europe are easily compromised by businesses that circumvent Europe for their data-processing activities. In the end it seems that the only adequate way to tackle the problems is to seek international solu-

tions. The key organization to act here is the OECD. In 1998 the OECD issued the Ministerial Declaration on the Protection of Privacy on Global Networks. The first step specifically taken in the direction of consumer protection is the privacy statement in the OECD Council Recommendation on Guidelines for Consumer Protection in the Context of Electronic Commerce.⁶⁰ As mentioned, these guidelines refer explicitly to the OECD Privacy Guidelines. The discussions between the EU and the United States about an adequate level of personal data protection illustrate, however, that a worldwide comprehensive approach is not easy to accomplish. In addition, the European situation shows that the introduction of new privacy legislation is exceedingly slow. Furthermore, an effective global privacy protection for consumers does not end with the implementation of the legal rules.

In conclusion, it appears that safeguarding consumers' privacy rights in an electronic environment requires a combination of legal measures and technology. This could be achieved by means of privacy-enhancing technology, where the consumer can control the flow of his personal information and can configurate the browser, and by the terminal equipment where the software itself complies with the privacy legislation. As regards the latter option, there is a long way to go since the majority of the software is developed in the United States. As is known, the US does not, by its own admittance fully comply with the European data protection legislation. In order to protect consumers' interests, it seems necessary that the Commission acts in this matter. There is a legal basis for the Commission to act in case business does not develop its own necessary privacy standards in equipment and software, according to Directive 99/5. However, this option may be limited to telecommunications terminal equipment. Here the Commission has a mandate to act when businesses do not develop equipment in a way that is compliant with the legislation. In its proposed new Telecom-Privacy Directive, the Commission indeed suggests such action (Explanatory Memorandum, paragraph 4).

Applicable Law

The Brussels Convention⁶¹ and the Rome Convention⁶² contain special provisions on international consumer contracts in order to protect consumers when contracting with foreign professionals, offering them access to a nearby forum and preventing the denial of actual access

to justice. Clearly, in both conventions the consumer rules have been written for a paper world and provide legal uncertainty with respect to on-line consumer contracts. One of the principal problems results from the distinction between active and passive consumers. The general idea behind the distinction is to protect solely the consumer who is solicited by the foreign business and not the consumer who actively seeks out the foreign merchant or service provider. But how to characterize a consumer who is looking at the Web site on his or her own initiative? Can the Web site itself be considered as an advertisement placed in the consumer's country? Does the seller's intention with respect to the range of the Web site (worldwide or limited to a certain number of countries) play a role? Can circumstances such as language, currency and choice-of-law or choice-of-forum clauses be of relevance? There is no unambiguous answer to any of these questions.

When the rules are strictly interpreted, the Internet consumer will in many cases not be protected, although protection may be particularly important exactly in on-line situations. Secondly, this legal uncertainty is detrimental to the development of electronic commerce, a development that may benefit businesses as well as consumers. In 2000, the European Commission adopted a Regulation on jurisdiction, recognition, and enforcement of judgements in civil and commercial matters, which intends to replace and update the Brussels Convention.⁶³ In this regulation, which will come into force at a later date, the European Commission remedies the inadequacies by including on-line consumer contracts in the special consumer protection rules on jurisdiction, expressly deciding in favour of the Internet consumer. Clearly, this choice is not welcomed by industry. Industry fears huge economic consequences as a result of this new legislation. Admittedly, the chance of being pulled into third country (e.g., outside the Community) courts all over the world can be an expensive risk for companies and may not be desirable economically. Earlier, in the beginning of November 1999, the European Commission, in order to identify the various positions and arguments, held a hearing on jurisdiction and applicable law. At this hearing consumer organizations pleaded strongly in favour of the new regulation whereas industry opposed it fiercely.

The European Commission is reportedly also preparing a draft regulation on applicable law to replace the Rome Convention, Article 5 of which provides special rules for consumer contracts. At this point

no actual proposal has been published, but allegedly this proposal has been put in phase with the draft regulation on jurisdiction. Revising this convention is not only important because Article 5 in its current reading may not apply to on-line consumer contracts, but also because of the necessity to arrive at a more uniform position on consumer protection rules with respect to applicable law. Though applicable law is generally determined on the basis of the Rome Convention, Community law in certain instances provides special rules, so-called scope rules. According to Article 20 of the Rome Convention, scope rules seem to prevail over Article 5 of the same convention, but the relation between Article 5 and these scope rules is rather unclear. The implications can be illustrated by means of the Distance Selling Directive and the Unfair Terms in Consumer Contracts Directive. Both directives protect the consumer even though a choice-of-law clause indicates the law of a non-Member State to be applicable.⁶⁴ The distinction between active and passive consumers is non-existent in these provisions, yet the close-connection criterion will most likely have to be interpreted in the light of Article 5 of the Rome Convention. As mentioned, the European legislator can draw up special rules, which will supersede Article 5 of the Rome Convention, but it is not allowed to set aside the basic principles of the Rome Convention. The consequence of this may be that the conditions with respect to the formation of contracts may still be relevant here. However, these conditions do not fit in with on-line consumer contracts. Therefore it is thus of particular importance that Article 5 of the Rome Convention is adapted to the characteristics of on-line consumer transactions and that the relationship between the rules on scope and the Rome Convention is made clear; preferably, by providing one exhaustive regulation of consumer contracts in the Rome Convention.

It should further be noted that discussions to address the problem of jurisdiction and applicable law are also held as part of the revision of The Hague Conference on Private International Law. Progress is however very slow and a June 2001 meeting showed that a revision in the light of Internet-related problems is not expected to be agreed upon in the near future. At an earlier round table conference of the Hague Conference, Web site certification was proposed as a way of addressing private international law problems with respect to consumer contracts. Under the system, on-line businesses would receive a certificate when adhering to a certain minimum level of consumer protection and offering the possibility of (free) alternative dispute

resolution. Certified Web sites would fall under the country-of-origin principle, since disputes would for the greater part be resolved through alternative dispute resolution. Non-certified Web sites would still be subject to the *forum consumptoris* rule. The system could actually work if countries and (international) organizations can agree upon a set of minimum standards for consumer protection, since it assumes a certain level of harmonization. Within the European Union consumer rules are still fragmented, but minimum norms are nevertheless set down in many areas. Several consumer organizations have already established such Web site certification schemes (e.g. Webtrader), which are self-regulatory ways of stimulating companies to adhere to basic principles for on-line shopping. As regards Web site certification schemes, it is however important to monitor observance of the rules by companies, hence preventing the use of the certificate solely for marketing purposes. This will be taken into account in more detail below.

SOCIAL PRECONDITIONS

A look at the position of the consumer in the Information Society shows that the mere provision of a legal framework is insufficient to address consumer needs. Without appropriate measures that cater for the surrounding issues, a legal framework will be less (or not) effective. In addressing these more social aspects, three basic issues are taken into consideration: education of consumers, access to content, and making the consumers' voice heard.

The question that needs to be answered here is whether the current European initiatives in the areas indicated sufficiently cover the emerging consumer needs. Before considering the actions undertaken so far in relation to these three areas, some brief remarks are in order on the most recent and most far-reaching branch on the European Information Society policy tree: "*eEurope: An Information Society for All*".

The Europe Initiative

On 8 December 1999, the European Commission launched the initiative "eEurope: An Information Society for All," proposing ambitious

targets in order to bring the benefits of the Information Society within the reach of all Europeans. The initiative has three key objectives focusing on ten priority areas. In the subsequent eEurope Action Plan, following the Lisbon summit, discussed at the European Council on 19 and 20 June 2000, the enhancement of consumer confidence is to be achieved since this will be a prerequisite for the further development of electronic commerce. In order to do so, the action plan, *inter alia*, proposes (a) to stimulate the adoption of pending legislative initiatives (draft directives on copyright, financial services, e-money, and jurisdiction), (b) to provide sufficient incentives for consumer groups and businesses to establish self-regulatory rules (particularly in the area of ADR), (c) to increase flexibility in electronic commerce regulation by building on self regulation through co-operation with business groups, and (d) to improve legal certainty for SMEs.

Sadly, from a consumer perspective the initiative is rather disappointing. Although it is aimed at creating a high-level Information Society with participation of all European citizens, the citizen's consumer role is hardly covered at all. "Building consumer trust" is mentioned in one of the objectives, but this objective has not been substantiated any further in any of the 10 priority areas.

Consumer Education

Developments in the field of ICT happen in quick succession. The amount of information services by electronic means will increase in coming years. New opportunities deriving from the rise of the Information Society will come into being, and consumers are supposed to take advantage of them. A prerequisite is, however, that consumers are aware of these opportunities and, one step further, are able to use Information Society services. Education is a prerequisite to the rise of the EU Information Society consumer. Without proper skills and knowledge (and the maintenance thereof) large segments of consumers will be cut off from the benefits the Information Society will offer. This requires a well-structured provision of information for and the education of all consumers.

In the area of education the Commission has launched a wide spectre of initiatives.⁶⁵ However, as the schedule below will demonstrate, consumer interests lack specific attention.

Initiative	Body responsible	Objective	Main focus in the field of education	Target group
Action Plan on Illegal and Harmful Content	DG Information Society	To promote the safer use of the Internet and to encourage, at a European level, an environment favourable to the development of the Internet industry	Increase awareness of the potential and the drawbacks of the Internet	Parents, teachers, and children
Netd@ys ⁶⁶	DG Education and Culture	To make people become familiar with the possibilities of using new media as resources for learning and teaching by spreading and exchanging experiences on knowledge and discovery	Education and training for improving digital literacy Raise awareness	Young people
Minerva (action under the Socrates programme) ⁶⁷	DG Education and Culture	To support transversal measures relating to open and distance learning and the use of information and communication technologies in the field of education	Establishing co-operation between various national organizations in Member States in the area of education	School education, higher education, and adult education
eLearning ⁶⁸	DG Education and Culture	Respond to the needs of the new e-economy	Emphasis on lifelong learning/emphasis on the use of ICT Speed up the entry of schools and other places of learning into the digital age	Young people

Initiative	Body responsible	Objective	Main focus in the field of education	Target group
Strategies for jobs in the Information Society ⁶⁹	DG Employment and Social Affairs	Elaborate strategies for fully exploiting the employment potential of the Information Society	Learn to use technology Learn to learn with technology	Young people
PROMISE ⁷⁰	DG Information Society/ISPO	To stimulate the Information Society in Europe	Raise awareness, understanding, and support by citizens of the possibilities of applications	All people
IST programme (key action III, action line III.3) ⁷¹	DG Information Society	To realise the benefits of the Information Society for Europe both by accelerating emergence and by ensuring the needs of the individuals are met	Stimulate RTD activities to implement or advance technologies for enhancing education and training systems	Companies carrying out RTD activities
Consumer Policy Action Plan ⁷²	DG Health and Consumer Protection	Promotion of a more powerful voice for the consumer throughout the EU	Information campaigns should have greater involvement of other interested parties Exchange good practices in the integration of education in schools Closer co-operation with Member States	Young people, adults, consumers
Presidency conclusions of the Lisbon European Council ⁷³	Council	Stimulate knowledge based e-economy throughout Europe	Confirmation and reaffirmation of the eLearning programme	Teachers, children, young people

Browsing through these initiatives, a number of conclusions emerge. First of all, apart from DG Health and Consumer Protection, none of the initiatives addresses specific consumer needs. Although it is clear that this is largely due to the political power of the interests at stake, the dawning of the Information Society (where consumers will have an important role) may create some chances here. Secondly, looking at the target groups, many of the Commission's initiatives envisage the enhancement of ICT skills of young people by integrating ICT into the education systems, such as schools and universities. However, hardly any of the initiatives specifically address the needs of people that may miss out on the Information Society, such as disadvantaged and vulnerable groups. A more "social" perspective, aiming to keep those people aboard, would be appropriate (even though such actions may be taking place at the level of Member States).⁷⁴

Furthermore, looking at the level of implementation, it is not always clear at what level (national or European) certain actions are aimed: Member States, or organizations and people within these Member States. It might be beneficial if the Commission were to examine the various target groups and to identify how each of them could be approached most effectively (directly, via Member States, or via organizations). Not least, looking at the future, the Commission may want to (re)consider its own role. Where should actions be focused: financial aid, dissemination of information, facilitating the exchange of best practices, stimulation of dialogue between Member States, or between national organizations in the Member States, etc.? The recent Council declaration in Lisbon seems to opt for the most direct and most practical approach feasible.

Access to Content

Access⁷⁵ to content is essential for the sound development of the Information Society. Without such access some consumers will not be able to reap the benefits of the Information Society; instead they will increasingly lose touch, creating a two-tier society. What are the relevant European actions relating to access to content and how do they serve consumer interests? Serious concerns can be raised as to the preservation of consumer interests in this field. In analysing access to content four areas are of importance:

- a. general competition rules
- b. intellectual property rights

- c. access to public sector information
- d. illegal and harmful content, as well as undesired services (on-line gambling).

General competition rules. Theoretically, the availability of competitive alternatives negates obligations under anti-trust law. Internet technologies and the presence of (alternative) networks are expected to minimize the barriers to market entry, making it likely that there will be a large number of providers of content and services. Such competitive conditions will discourage legal intervention. Obviously, an essential prerequisite is that services, content, and networks are compatible. In order for a competitive market to be relied upon in preference to law, it must exist.

This is an important point in the Internet environment, where, although technology-driven developments are taking place with the speed of light, certain essential elements in the chains of communication have established (or are gaining) tremendous power (e.g., providers in the software market, conglomerates of broadcasting companies, cable companies). Moreover, providers are integrating both horizontally and vertically, bringing together (or concentrating) applications, networks, and content. Furthermore, Internet Information Society technologies are largely dependent on standardization, creating de facto monopolies. Simultaneously, the assessment of market sizes and market shares and (dominant) positions of companies operating therein, is not getting any easier: contours of markets are becoming blurred whilenew kinds of markets emerge, and, simultaneously, converge. Additionally, competition authorities may be reluctant to carry the burden of killing off hopeful European enterprises, at a time when Europe is trying to catch up with the US in the field of information technology. Hence, there is a substantial risk that these developments may seriously hamper the consumer's freedom of choice, in the long run leading to distortion of competition and lower price/quality ratios.

Intellectual property rights. Consumers have legitimate interests in taking cognizance of information. This has been laid down, *inter alia*, in Article 10 of the European Convention on Human Rights. It includes the freedom to receive and impart information. However, the exercise of this freedom is subject to restrictions, including rights of others. This refers, *inter alia*, to intellectual property rights⁷⁶ of third

parties, mainly copyright and the *sui generis* right. Below, we will look at these areas of law, since they have been, or are being, the subject of modernization at the European level. As we will see, these modernizations pose serious threats to the legitimate interests of consumers.

Database directive. ICT has dramatically increased the ability to store, update, and retrieve information. Increasingly, this has resulted in the proliferation of electronic databases that allow users to combine software and information into powerful tools for research and educational and commercial applications. At the same time, however, new technologies have enhanced the possibilities to copy and sell databases illegally. Considering this, the Commission launched an initiative to provide protection in this field and in 1996 the Database Directive⁷⁷ was adopted.

The directive creates a two-tier system to reward both creativity and investment. First, it gives limited copyright protection, protecting those elements of personal creativity that have gone into the construction of a database. Secondly, it accords those who invest in databases a right to prevent extraction and re-utilization of their contents (the so-called *sui generis* right). In the context of consumer protection, the *sui generis* right is most alarming in respect of freedom of information, since it monopolizes information: The protection is not limited to copyrighted work, it extends to factual information beyond the usual range of copyright. Such content is protectable not because it represents the expression of intellectual activity, but because of the investment involved in its production. Although the directive grants users a variety of rights (extraction and re-use of insubstantial parts of a database), it will be quite uncertain how these rights can be used, especially since national courts are to determine how much data will constitute a “substantial” part of a work. Only in respect of non-electronic databases, may an individual use the database for “private purposes.”

As indicated, the alarming part of this directive is the monopolization of information, traditionally something beyond the reach of copyright. Earlier drafts of the directive contained a provision, allowing for compulsory licensing schemes. Compulsory licences were contemplated in those cases where the data found in the database could not be independently created, collected, or obtained from other sources. Under such circumstances, the data were to be made avail-

able on “fair and non-discriminatory terms.” Unfortunately, this was lost in the adoption process. However, there may be an opportunity to bring this gap to the attention of the European legislators, since the directive contains a self-evaluation mechanism which allows the Commission to monitor the results of national legislative action: By the beginning of 2001, and every three years thereafter, the Commission is to submit a report on the application of this directive.

Copyright directive. On 21 May 1999, in response to the amendments submitted by the European Parliament, the Commission issued the draft Copyright Directive.⁷⁸ The final text of this directive was adopted in 2001.⁷⁹ According to the directive, it aims at adjusting and complementing the existing EU framework on copyright and related rights in order to respond to the new challenges of technology and the Information Society, to the benefit of both right holders and users. Furthermore, it envisages establishing a level playing field for copyright protection in the new environment, in particular covering the reproduction right, the communication to the public right, the distribution right, and legal protection of anti-copying and rights management systems.

In the context of consumer protection, this initiative is of paramount importance, since it directly affects consumers’ right of access to content. More specifically, Article 5 (provisions on exceptions to the exclusive rights of reproduction and communication to the public, including the “right to make available”) and Article 6 (protection of technological measures against circumvention) contain provisions that seriously threaten European consumers’ interests, being in conformity with the international legal framework arising from recent WIPO treaties and the Bern Convention⁸⁰ and breaking away from traditional exceptions and limitations.⁸¹ Furthermore, technical protection rules may prevent consumers from accessing content, even if they have a legitimate right to do so under the limitations of copyright, and traditional library and research and study privileges seem to have vanished or have had their wings clipped.

In conclusion, the assessment seems justified that the current proposal jeopardizes the legal position of the consumer, not only directly. The Copyright Directive, like the Database Directive, monopolizes access to information, cutting off those who cannot afford to buy certain content. Furthermore, it limits the traditional exceptions

for libraries and similar institutions. The European Union could have sought a more balanced solution, allowing consumers to copy for purely private use as well as for other purposes in the public interest, and allowing for organizations that have as their specific mission to make content accessible (e.g. libraries), to be able to accomplish this mission.

Access to public sector information. Access to public sector information is an important source of consumers' right of access to content. Most national legal frameworks have vested their citizens with the right to have access to information which is held by the public sector (in spite of or in the absence of copyright). ICT has had a strong impact on this field of information law. New technologies allow public sector bodies to provide their citizens with access to a massive amount of information, enabling them to exercise their legitimate (democratic) rights more effectively. Simultaneously, public sector bodies discover that the (large repositories of) information they hold, represent a vast economic value, tempting them to exploit these resources. These two developments can easily lead to tensions. Underlining the importance of this area, the European Commission has launched a prominent initiative, which may have an important impact on consumer access to content: the "Green Paper on PSI."^{82,83}

From the perspective of consumer protection, the Green Paper on PSI is at the centre of a number of key interests, both in terms of access to and use of public sector information. It has tried to bring together (a) the issue of facilitation of the operation of the Internal Market and improvement of European competitiveness through easier access to information and (b) the broader issue of Freedom of Information. Unfortunately, the Green Paper on PSI is very much focused on the Internal Market aspects, sidestepping the important matters of governments' communications with their citizens, equal access to that government information, and the accountability of public bodies to citizens in democratic states. It is foreseen that the Commission will issue a follow-up Communication in the very near future. However, no spectacular initiatives (such as a proposal for a directive) are expected.⁸⁴

In conclusion, access to public sector information is an issue of great importance from the perspective of consumer interests in the Information Society, since public sector information represents a vast area of information where European consumers have legal rights to

access. Clearly, the Green Paper on PSI demonstrates the “European edge” and both the Commission and consumer organizations should continue their efforts to allow citizens to exercise their rights and create practical mechanisms to enable them to do so. In view of the Communication to be issued, consumer organizations should exploit the political momentum to create awareness about the consumer side of the issues.

Protection against undesired content and services. Finally, at the other end of the spectrum, consumers may have legitimate interests in being able to avoid certain types of explicit content and services (e.g., on-line gambling), which they do not want (their children) to be confronted with. In combating these types of content by means of legislation, the role of the EU is limited. Treaties, such as the European Convention on Human Rights and the UN Convention on the Rights of the Child, as well as the EC-Treaty and the principle of subsidiarity pose significant restrictions on the range of possible measures that can be taken at Community level. Therefore, no directives in this field have been produced. Instead, the EU has focused its efforts on non-regulatory measures. In January 1999, the European Parliament and the Council adopted the Action Plan on illegal and harmful content.⁸⁵ Under four “action lines” a wide variety of actions are undertaken: creation of a European network of hotlines, encouragement of self-regulation and drafting of codes of conduct, development of filtering and rating systems, establishment of awareness actions, and support actions. However, the actions undertaken so far have been very limited.

In its attempt to combat illegal and harmful content and services the European Commission should continue to keep up the dialogue with consumer organizations and other key players in this area. Furthermore, the Commission, especially DG Justice and Home Affairs, should continue its work within the framework of the third pillar, creating awareness, training law enforcement officers, and facilitating the creation of networks to combat illegal content, since national approaches in this field have turned out to be not very effective. International (preferably supra EU) co-operation is required.

Competition (law) appears to be the most important mechanism for preserving the consumers’ legitimate interests in having access to content. However, the European legislator has launched some regulatory initiatives that may seriously impair traditional consumers’

rights in this field. Public sector information is an important species of information, access to which should be at the forefront of the political debate. Here, legal access rights should be endorsed by practical mechanisms for disclosing such information. Given the European context, the Commission should take a coordinating and stimulating role herein. This also applies to the combat of illegal and harmful content and services, where the Commission's role is also limited, but nevertheless important in terms of policy coordination and dissemination of best practices.

Making the Consumers' Voice Heard

In what way can the voice of the consumer be heard, and how should it be amplified throughout Europe? In what way can consumer organizations play a role in this, taking note of the developments – most importantly: internationalization, the fading role of the legislator, and the emergence of new and intensified communication modalities – in the Information Society? Traditionally, consumer organizations⁸⁶ have played an important role in the development of consumer protection. The technological and social and economic developments related to the dawning of the Information Society affect the role of the consumer organizations. The traditional roles of such organizations (one-way information provision, legal actions, and lobbying) are complemented by the new services emerging. We see that, all over the world, consumer organizations are gradually changing their core activities, gearing them towards the requirements set by the Information Society. Most prominently, three new fields must be mentioned:

- a. as active collector, processor, and disseminator of information
- b. as facilitator, bringing together consumers, businesses, and policy makers
- c. as stakeholder in (self-)regulatory initiatives.

Active collector, processor, and disseminator of information. Web sites and e-mail allow for active communication with the consumer. Familiarity with electronic mail has decreased the psychological threshold for contacting the consumer organizations. As a consequence, the organizations are better informed about the needs and concerns of consumers; there are direct links with the target groups 24 hours a day. The transfer of information has become two-way

traffic, instead of one-way. Subsequently, the focus of action is shifting towards more pro-active and preventive initiatives (as opposed to more conflict-oriented actions).

Facilitator, bringing together consumers, businesses, and policy makers. In line with this, consumer organizations are well placed to establish platforms where the main players can (virtually) convene. The recent initiative “Webtrader” is a perfect example of this new role. Under an EU-funded project, consumer associations in eight EU Member States have developed a national quality seal for sales conducted via the Internet, called Webtrader.⁸⁷ Providers of services complying with the requirements laid down in the Webtrader code are allowed to use the Webtrader logo on their Web site. Consumers stumbling upon this logo on a Web site can duly trust that the service offered is consumer friendly. If not, complaints may be lodged with the national consumer organization. Providers are free to apply for the logo to those consumer associations which are entitled to give their consent to the use of the Webtrader logo. The conditions for consent are easily accessible for consumers and businesses via the Internet. Consumer organizations invite consumers to state their experiences with a “Webtrader seller” via a digital forum. The sellers are asked to react to the statements of the consumers via the same digital forum. This leads to an ongoing process, stimulating intensive direct dialogue between consumers and producers, using the benefits of the Information Society.

Stakeholder in (self-)regulatory initiatives. Finally, national and international policy makers are increasingly coming to the conclusion that the stimulation of self-regulation is one of the key elements in the Information Society. This is demonstrated by the presence of representative consumer and business organizations in various fora that have been and are being established all over the world. This is also mirrored by a formalization of the role of such bodies in Community legislation: Article 16(2) of the Electronic Commerce Directive states that consumer associations shall be involved in the drafting and implementation of codes of conducts, for instance. Likewise, Article 6 of the draft Directive on a Common Regulatory Framework for Electronic Communications Networks and Services requires Member States to publish their national consultation procedures, and Article 29 of the draft Directive on Universal Service and

Users' Rights relating to Electronic Communications Networks and Service requires Member States to ensure that the views of users and consumers are taken into account.

CONCLUSION

This analysis shows that the Commission has taken a substantial amount of initiatives to ensure a high level of consumer protection in the Information Society. In addition, it appears that numerous rules of the traditional legal framework are still equipped to function properly in the on-line world and that the well-known guiding principles of the European Court of Justice are apt to protect consumer interests on the Internet. For example, the Distant Selling Directive and the Directive on Misleading and Comparative Advertising contain provisions to ensure that the consumer will be correctly informed about relevant features of products. The Court of Justice has taken into account "the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect"⁸⁸ in order to determine whether a promotional statement is liable to mislead the purchaser. On the Internet, with its reasonably well informed information-seeking consumers, this concept can most certainly be used as a normative guideline. At the same time, some exceptions to this guideline should be accepted, depending on the target group (e.g., children), the nature of the products or services, and the advertising medium. In respect of access to information and on-line search methods (hyperlinking and meta tagging) one can rely on the existing regulatory network, unfair competition law, and intellectual property laws.

However, the previous discussion also shows that the present European consumer protection framework is certainly not able to address *all* the problems and needs that emerge from on-line consuming. Various blanks remain and action is needed in those areas. We noted, for example, that clarification is needed about the way in which companies have to distinguish commercial information from objective information on the Internet. In spite of the general rule that commercial communication should be recognisable as such (laid down in the Directive on Electronic Commerce and the Distant Selling Directive), no guidance is given as regards the way in which

companies have to make this distinction. Especially in respect of information with regard to prescribed medication it is imperative that companies draw a clear borderline between editorial information and commercial communication. Also with regard to vulnerable consumer groups such as children it is of the utmost importance that commercial communication is clearly identifiable as such. Urgent action is needed. Apart from that, the rules on spamming still need clarification: The problem of the legality of spam mails is not yet solved. As mentioned earlier, the Commission has taken recent action to clarify this by proposing an opt-in system for spam mail. The health risks involved in Web prescription of drugs and medical advice that is (automatically) given on the Internet without professional interventions are substantial. Since health is a preeminent consumer interest, serious consideration has to be given to whether there is a need for public legislation that regulates medical advice on the Internet. Further, a broader concept of *fair advertising* that is valid both off-line and on-line would be beneficial for consumers.

In finding the answers and solutions to the various problems and blanks, the European Union should be careful in transposing familiar rules to the on-line world. For example, it may not be feasible to transfer existing rules that apply to, e.g., television or other media to the Internet environment since many of those rules are specific for the technology that is used. The Commission will need to contemplate which tools are workable, not only in view of whether the distinction between mass communication and one-on-one communication can still be made, but also taking into account future technology developments, such as webcasting and the telecom aspects of electronic commerce. Furthermore, the Commission has to be very careful when allowing certain new – electronic – benefits for consumers to become a substitute for fundamental interests such as privacy, free flow of information, and access to justice. The consumer implications of new techniques for copyright protection, filtering of certain harmful and illegal content, encryption and alternative dispute resolution should be carefully taken into consideration.

Prior to deciding how the present legal framework should be adapted and what specific rules should apply in the on-line world, it is also of importance to consider the level of regulation at which the new rules can best be shaped: through legislation, self-regulation, or co-regulation. In the end, the enforcement of the resulting regula-

tion is of crucial importance. Especially in an international context, enforcement of (consumer) regulation appears to be a problematic issue (Koops, Prins, Schellekens, Gijrath, & Schreuders, 2000).

There is more than just the legal framework that needs to be reconsidered. Without appropriate measures that cater for a number of surrounding issues, a legal framework will be less effective. Access to infrastructure, services, and content will be critical to the sound development of the Information Society; competition (law) will need to ensure such access for consumers. Additionally, education is a prerequisite for the rise of the EU Information Society consumer. Without proper skills and knowledge (and the maintenance thereof), large segments of consumers will be cut off from the benefits the Information Society can offer.

Finally, we wish to stress the importance of the role of consumer organizations in establishing a virtual market that is an accessible, understandable, and safe place for consumers. The Internet allows consumer organizations not only to do their work more effectively and efficiently, but also to shift their attention towards other areas, formerly uncovered.

In strengthening the position of the consumer organizations, the European Union, again, has a role to play. First, consumer organizations need to co-operate more intensively than hitherto. In this respect, the Commission should continue its efforts to stimulate and facilitate such international co-operation. Furthermore, given the global nature of the Internet, consumers need to be represented by consumer organizations in the various international fora (e.g., OECD, WTO), because decisions taken there will have a large impact on consumer protection. Simultaneously, the role of regional and global consumer organizations will gain weight, and the Commission should, in close collaboration with the Member States, ensure that international bodies representing the consumer are able to take part in these important dialogues. Technology enables consumer organizations to maintain interactive liaisons with consumers and businesses. This allows them to stay well-informed and contributes to their resolve. Close collaboration with these consumer organizations will allow the Commission to remain updated on all relevant day-to-day developments in the Member States. Hence, the Commission should maintain and fortify its ties with these organizations and facilitate and channel the cross-border flow of information between the consumer organizations in the Member States. Finally, the Commission should strengthen its

support of consumer organizations, among other ways by providing financial means for their development, thereby ensuring the birth of creative initiatives.

NOTES

¹ For the various problems and concerns, see in more detail the 1999 comparative study produced by Consumers International, titled *Consumers@shopping, An international comparative study of electronic commerce*. Available at: <http://www.consumersinternational.org/campaigns/electronic/e-comm.pdf>.

² See the report "Electronic Commerce and the role of the WTO," WTO Publications, March 1998 as well as the work programme on electronic commerce adopted by the General Council on 25 September 1998.

³ The OECD issued in December 1999 the *Guidelines for Consumer Protection in the Context of Electronic Commerce*. Available at: <http://www.oecd.org/dsti/sti/it>.

⁴ See, among others, the initiatives of BBBOnline in the United States and the certification schemes launched by consumer associations in the UK, the Netherlands, and several other European countries.

⁵ European Parliament Resolution A4-0173/98 on the Communication from the Commission of 14 May 1998 on "An European Initiative on Electronic Commerce", COM(97) 157, OJ C 167/203, 01.06.1998.

⁶ Communication from the Commission to the Council, the European Parliament, the Economic and Societal Committee and the Committee of the Regions on "The Implications of the Information Society for European Union Policies. Preparing the next steps", COM(96) 395final, 24.7.1996.

⁷ Resolution of the Council of 19 January 1999 on the Consumer Dimension of the Information Society, OJ C 023/1, 28.01.1999.

⁸ Directive 2000/31/EC of the European Parliament and Council of 4 May 2000 on certain legal aspects of electronic commerce, OJ L 178/1, 17.7.2000.

⁹ The study (entitled *Study on Consumer Law and the Information Society*) was assigned by the European Commission (Directorate General Health and Consumer Protection) and conducted by a consortium of PricewaterhouseCoopers N.V., Tilburg University, and the University of Utrecht. The authors of this article were responsible for the study.

¹⁰ This section is based on a chapter of the aforementioned report that was co-authored by Jan Kabel and Madeleine de Cock Buning.

¹¹ Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250/17, 19.9.1984, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 as to include comparative advertising, OJ L 290/18, 23.10.1997.

¹² The Television without Frontiers directive, the Directive on Electronic Commerce and the directive on Distance Selling, successively Directive 89/552/EEC of the Council of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298/23, 17.10.1989, as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, OJ L 202/60, 30.7.1997; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of Information Society services, in particular elec-

tronic commerce, in the Internal Market (“Directive on Electronic Commerce”) OJ L 178/1, 17.7.2000; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144/19, 4.6.1997.

¹³ E.g., foodstuffs, cosmetics, pharmaceuticals, tobacco products, successively Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation, and advertising of foodstuffs for sale to the ultimate consumer, OJ L 33/1, 8.2.1979, as amended by Directive 89/395/EEC of 14 June 1989, OJ L 186/17, 30.06.1989; Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ L 262/169, 27.9.1976 as amended by Directive 88/667/EEC of 21 December 1988, OJ L 382/46, 31.12.1988 and Directive 93/35/EEC of 14 June 1993, OJ L 151/32, 23.6.1993; Directive 92/98/EEC of 16 November 1992, OJ L 352/1, 2.12.1992; Directive 89/622/EEC of 13 November 1989, OJ L 359/1, 8.12.1989 and Directive 98/43/EC of the European Parliament and the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 213/9 30.7.1998.

¹⁴ Consumer Credit, Travel, successively Directive 87/102/EEC; Directive 90/134/EEC.

¹⁵ E.g., for children: TVWF Directive Article 16, 89/552/EEC, OJ L 298/23, 17.10.1989, as amended by Directive 97/36/EC, OJ L 202/60, 30.7.1997.

¹⁶ E.g., the Trade Mark Directive and the Directive on price indications, successively Directive 89/104/EEC of 21 December 1988, OJ L 040/1, 11.02.1989; Directive 98/6/EC, OJ L 080/27, 18.03.1998; the TVWF Directive contains rules on non spot advertising and sponsoring, 89/552/EEC, OJ L 298/23, 17.10.1989, as amended by Directive 97/36/EC, OJ L 202/60, 30.7.1997.

¹⁷ Cour d’appel de Rennes, 1ere Ch.B, Arrêt du 31 mars 2000: SA coopérative “Compagnie Financière du Crédit Mutuel de Bretagne” vs. Association “Fédération logement consommation et environnement d’Ille-et-Vilaine”, published at <http://www.legalis.net>.

¹⁸ See Note 17.

¹⁹ Distant Selling Directive Article 4: Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144/19, 04.06.1997.

²⁰ There is a drawback to such a flexible concept of misleading advertising. In its Green Paper on Commercial Communications, the Commission regrets this flexibility, because it gives ample possibilities for national judges to interpret this concept differently in different Member States, COM(96) 192 final, pp. 21–22. In addition, the Directive on Misleading Advertising is a minimum directive that does not preclude Member States from retaining or adapting provisions with a view to ensuring a more extensive protection with regard to misleading advertising. See, e.g., for differences in the rules applicable in Germany and Italy, Vahrenwald (1996).

²¹ Successively C-238/89, OJ C 15/8 1991; C-362/88, OJ C 92/11 1990; C-315/92, OJ C 76/1 1994; C-373/90, OJ C 33/6 1992; C-241/89, OJ C 10/9 1991.

²² Directive on Misleading and Comparative Advertising, 97/55/EC, Article 7 par. 4 and 5.

²³ Another reason would be the decision of the European Commission in the EPI case, Decision of 7 April 1999, OJ L 106/14, 23.04.1999.

²⁴ Article 3.1 Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use, OJ L 113/13, 30.04.1992.

²⁵ The same holds for medical claims concerning foodstuffs that are prohibited in the Directive on the Labelling, presentation and advertising of foodstuffs (79/112/EEC,

OJ L 33/1, 8.2.1979, as amended by Directive 89/395/EEC, OJ L 186/17, 30.06.1989), Article 2 par. 1(b).

²⁶ A patient with a heart condition was for example given *Viagra* after Internet consultation. Since *Viagra* has been linked to the death of heart patients and should not be given to people taking nitrate drugs for heart diseases, this could have been a vital error, see BBC News Online: "Web prescription alert", 5 June 2000, published at: http://news.bbc.co.uk/hi/english/health/newsid_778000/778645.stm.

²⁷ Article 6c and d Electronic Commerce Directive, 2000/31/EC, OJ L 178/1, 17.07.2000.

²⁸ These conclusions are based upon the national reports to the Questionnaire for the International League for Competition Law on Question 3: Unfair Competition and the Internet, Venice 1999. These reports will probably be published, together with a Draft Code on Unfair Competition and the Internet. See, for the international report, Hoeren (1999).

²⁹ Article 10.1 of the TVWF Directive contains the principle that editorial and commercial communication has to be clearly distinguished; the application of this principle in Article 11 (the interruption system) is however tailor-made for television and cannot be used for the Internet, Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298/23, 17.10.1989, as amended by Directive 97/36/EC of 30 June 1997, OJ L 202/60, 30.7.1997.

³⁰ Article 6a Electronic Commerce Directive, 2000/31/EC of 8 June 2000, OJ L 178/1, 17.07.2000.

³¹ Article 4 Distant Selling Directive, 97/7/EC of 20 May 1997, OJ L 144/19, 4.6.1997.

³² On the Internet one can find more and more companies sponsoring sites. A producer of cosmetics can, for example, sponsor a site with information for teenagers and their problems. On this site information about pimples can be given and teenagers can unknowingly be lured to buy the sponsor's anti-pimple product.

³³ Article 6 b Electronic Commerce Directive, 2000/31/EC of 8 June 2000, OJ L 178/1, 17.07.2000.

³⁴ Article 16 TVWF Directive, 89/552/EEC of 3 October 1989, OJ L 298/23, 17.10.1989, as amended by Directive 97/36/EC of 30 June 1997, OJ L 202/60, 30.7.1997.

³⁵ Istituto dell'Autodisciplina Pubblicitaria (IAP). <http://www.iap.it>.

³⁶ Also the unsolicited sending of SMS messages is considered to be spamming.

³⁷ Article 10 Distant Selling Directive, 97/7/EC of 20 May 1997, OJ L 144/19, 4.6.1997.

³⁸ Article 12, Directive 97/66/EC of the European Parliament and the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, OJ L 024/1, 30.01.1998.

³⁹ Proposal for a Directive concerning the processing of personal data and the protection of privacy that is intended to replace the current Directive 97/66/EC, COM (2000) 385final, Article 13.

⁴⁰ Article 7 Electronic Commerce Directive, 2000/31/EC of 8 June 2000, OJ L 178/1, 17.07.2000.

⁴¹ "Within its own territory, the Member State in which the consumer goods are marketed may, in accordance with the rules of the Treaty, provide that the guarantee be drafted in one or more languages which it shall determine from among the official languages of the Community."

⁴² Of course, an electronic transaction can also result in the deliverance of physical

goods that do not allow on-line delivery. However, we restrict the discussion here to liability problems in relation to services (or products) which can be ordered and delivered on-line.

⁴³ Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210/29, 07.08.1985, as amended by Directive 1999/34/EC of 10 May 1999, OJ L 141/20, 04.06.1999.

⁴⁴ According to Article 2 “product” means all movables (with some exceptions) and it includes electricity.

⁴⁵ Proposal for a Council Directive on the liability of suppliers of services, COM(90) 482final, OJ C 12/8, 18.01.1991.

⁴⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12, 07.07.1999.

⁴⁷ However, some international treaties (to which all Member States are party) contain specific provisions on fair trial requirements, and this has led to a long list of decisions, most notably of the European Court of Human Rights, with far-reaching effects. Also, Community law imposes some limits to the power of the Member States. See: Judgement of 26 September 1996, *Data Delecta and Forsberg*, C-43/95, ECR 96/I-4661; judgement of 20 March 1997, *Hayes*, C-323/95, ECR 97/I-171.

⁴⁸ Green paper on consumer access to justice and the settlement of consumer disputes in the single market, COM(93) 576final of 16 November 1993.

⁴⁹ Action Plan on consumer access to Justice and the settlement of consumer disputes in the internal market, COM(96), 13final of 14 February 1996.

⁵⁰ European Parliament resolution of the Commission Communication on consumer access to justice and the settlement of consumer disputes in the internal market of 14 November 1996, OJ C 362/275, 2.12.1996.

⁵¹ Communication from the Commission on the “out-of-court settlement of consumer disputes”, COM(98) 198final, holding a Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes of 30 March 1998, 98/257/EC, OJ L 115/31, 17/04/1998.

⁵² The final text of Article 17(1) obliges the Member States to ensure that their legislation does not hamper the use of out-of-court schemes, including appropriate electronic means. The second section of Article 17 stipulates that Member States shall encourage bodies responsible for out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned. The third section encourages a wide exchange of information hereon around Europe.

⁵³ The Commission works on specific initiatives in this field. Several initiatives have been launched that aim at encouraging the development of ADR systems. In April 2000, the Member States gave a strong backing to a proposal from the Commission to set up an alternative dispute mechanism network for on-line purchases.

⁵⁴ This view was also expressed by the BEUC in: *Consumers’ rights in electronic commerce. Jurisdiction and applicable law on cross-border consumer contracts* of 8 October 1999, p. 5, Available at: <http://www.beuc.org/public/papers/pa1999/content.htm>.

⁵⁵ *BW/Harris Poll: Online insecurity*, Business Week, 16 March 1998. Available at: <http://www.businessweek.com/1998/11/b3569107.htm>.

⁵⁶ OECD Recommendation concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, adopted by the Council of the OECD of 23 September 1980 (OECD Privacy Guidelines). OECD Document [C(80)58(Final)], October 1 1980. Available at: <http://www.oecd.org>.

⁵⁷ Recommendation of the OECD Council concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, including an Annex Guidelines, Paris, 9 December 1999. Available at: <http://www.oecd.org>.

⁵⁸ Case of Lüdi vs. Switzerland of 15 June 1992, Series A no. 238.

⁵⁹ Recently, the Commission issued the proposal for a Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector.

⁶⁰ Recommendation of the OECD Council concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, including an Annex Guidelines, Paris, 9 December 1999. Available at: <http://www.oecd.org>.

⁶¹ Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters of 27 September 1968, OJ C 27/1, 26.01.1998 (consolidated version).

⁶² Rome Convention on the law applicable to contractual obligations of 19 June 1980, OJ C 27/34, 26.01.1998 (consolidated version).

⁶³ Council Regulation on jurisdiction and the enforcement of judgements in civil and commercial matters. See also the Proposal of 14 July 1999, COM(99) 348final, OJ C 376E/1, 28.12.1999.

⁶⁴ According to Article 12 Distant Selling Directive: "Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States." An identical provision is included in the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29, 21.04.1993 (see Article 6.2).

⁶⁵ Most notably:

- a. Action plan on illegal and harmful content, Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting the safer use of the Internet by combating illegal and harmful content on global networks, OJ L 33/1, 26.02.1999.
- b. Netd@ys, an extended initiative deriving from the Action Plan entitled "Learning in the Information Society" (1996–1998).
- c. Decision 2000/253/EC of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education "Socrates", OJ L 28/1, 03.02.2000.
- d. eLearning – Designing tomorrow's education, Communication from the Commission of 24.05.2000, COM(2000) 318final.
- e. Strategies for jobs in the Information Society, a Commission's communication, COM(2000) 48 final, 04.02.2000.
- f. Presidency conclusions of the Lisbon European Council, prepared by eEurope, an Information Society For All, communication on a Commission initiative for the Special European Council of Lisbon, 23 and 24 March 2000.
- g. Council Decision 98/253/EC of 30 March 1998 adopting a multiannual Community programme to stimulate the establishment of the Information Society in Europe (Information Society), OJ L 107/10, 07.04.1998.
- h. Council Decision of 25 January 1999 adopting a specific programme for research, technological development and demonstration on an user-friendly Information Society (1998–2002) OJ L 64/20 12.3.1999. For more information, see <http://www.cordis.lu/ist>.
- i. Consumer Policy Action Plan 1999–2001, Council Resolution of 28 June 1999 on Community consumer policy 1999 to 2001, OJ C 206/1, 21.07.1999.

⁶⁶ For more information, see <http://europa.eu.int/comm/education/netdays> and <http://www.netdays2000.org>.

⁶⁷ For more information, see <http://europa.eu.int/comm/education/socrates/minerva/ind1a.html>.

⁶⁸ For more information, see http://europa.eu.int/ISPO/topics/i_educatio.html and <http://europa.eu.int/comm/education/elearning>.

⁶⁹ Communication from the Commission of 04.02.2000, COM(2000) 48final. For more information, see http://europa.eu.int/comm/employment_social/index_en.htm.

⁷⁰ Council decision of 30 March 1998 adopting a multiannual Community programme to stimulate the establishment of the Information Society in Europe (Information Society) OJ L107/10, 7.4.1998. For more information, see http://www.ispo.cec.be/promotion/i_promise.html.

⁷¹ Council Decision of 25 January 1999 adopting a specific programme for research, technological development and demonstration on a user-friendly Information Society (1998–2002) OJ L64/20, 12.3.1999. For more information, see <http://www.cordis.lu/ist>.

⁷² Consumer Policy Action Plan 1999–2001, Council Resolution of 28 June 1999 on Community consumer policy 1999 to 2001, OJ C 206/1, 21.07.1999. For more information, see http://europa.eu.int/comm/dgs/health_consumer.

⁷³ For more information, see <http://ue.eu.int>.

⁷⁴ In this context the Council stressed quite rightly (in the presidency conclusions of the Lisbon Council) that all target groups (e.g., young people, but also unemployed adults), at different stages of their lives should be able to benefit from the education and training systems (which is fully in line with the consumer policy action plan stating that adults as well as young people deserve attention).

⁷⁵ Although access can be looked at from many different angles: access to knowledge (education), access to networks (mainly telecom), access to services, focus will be put on access to content.

⁷⁶ Law protects intellectual property because intellectual creativity is stunted if creators are unable to recover their investment in inventive or creative effort before competitors appropriate their authorship or inventions and get a free ride on the creative effort. Traditionally, law protects these creative minds by providing a limited monopoly. However, the exercise of this right is subjected to certain constraints, *inter alia* catering for consumers' interests.

⁷⁷ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases ("Database Directive"), OJ L 77/20, 27.03.1996.

⁷⁸ Amended Proposal for a European Parliament and Council directive on the harmonisation of certain aspects of copyright and related rights in the Information Society ("draft copyright directive"), COM(99) 250final, OJ C 180/6, 25.06.1999.

⁷⁹ 2001/29/EC, OJ L 167/15, 22.06.2001.

⁸⁰ It contains an exhaustive list of – mostly (for Member States) optional – exceptions and limitations. The concept of an exhaustive list does not comply with the international commitments arising from the two WIPO treaties concluded in December 1996, which allow for the development of new exceptions and limitations in copyright laws, appropriate to the digital environment. Furthermore, according to Article 5(4) these (exhaustive) exceptions and limitations are applicable to those cases where the rights holders' legitimate interests are not unreasonably prejudiced nor in conflict with the normal exploitation of their works. This is not in line with the relevant provision of the Bern Convention, where only the conditions applicable to exceptions or limitations to the reproduction right are specified and where the consideration of the unreasonable prejudice consideration only concerns authors' interests, as opposed to all categories of rights holders.

⁸¹ Article 5 creates a situation where consumers may be provided with a limitation of the reproduction right (for private and personal (non-commercial) use) on condition that right holders will receive fair compensation, thus putting them under the obligation to pay, even if the right holder is not limited in its (potential) revenues.

⁸² Green Paper on Public Sector Information in the Information Society of 20 January 1999 ("Green Paper on PSI"), COM(98) 585final.

⁸³ The Green Paper on PSI, aimed at stimulating the discussions of the issues identified therein, is not a document containing any binding legal obligations. However, it is important because it sets out the scope of the discussions. Most likely the Green Paper on PSI will be followed by a Communication (based upon the comments submitted) containing proposals on (possibly) a directive. The Green Paper on PSI has experienced a rather complicated birth inside the premises of the Commission, since it grapples with a number of issues which are not only quite difficult to solve, but also do not automatically fall under the competence of the Commission, within the framework of the EU-Treaty.

⁸⁴ More alarming is the proposal put forward recently, containing a framework of rules aimed at regulating citizens' rights to access of (*inter alia*) Commission documents. (Proposal for a regulation of the European Parliament and of the Council and the Commission on public access to documents of the European Parliament, the Council and the Commission of 26 January 2000, OJ C 177E/70, 27.06.2000. See <http://www.statewatch.org/swreg.htm>.) Euphemistically put, based on the reactions submitted so far, this document does not cater for all expectations that existed in this area.

⁸⁵ Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting the safer use of the Internet by combating illegal and harmful content on global networks, OJ L 33/1, 26.02.1999. Dealing with this substance, the Commission has introduced an important distinction between illegal content (content that falls under the scope of criminal law in Member States, such as child pornography and material inciting racial hatred) and harmful content (content that may be regarded as detrimental, however not establishing a criminal act in Member States). This distinction poses radically different issues of principle and calls for very different legal and technological responses: measures on illegal content should aim at combatting the source of the content, whereas harmful content calls for measures aimed at raising awareness and empowering users.

⁸⁶ In Europe, many consumer organizations and networks of these organizations are active. Each country has one or more national consumer associations. Many of them are members of the BEUC, the European umbrella organization. Consumers International is the global umbrella organization. Most of the national consumer associations and the BEUC are also members of this global organization. Moreover, in 1995 the Commission established the Consumer Council, in which the national consumer associations and some European organizations are represented. Furthermore, the transatlantic Consumer Dialogue is a forum of US and EU consumer organizations which develops and agrees on joint consumer policy recommendations to the US government and European Union to promote consumer interest in EU and US policy making.

⁸⁷ <http://www.which.net/webtrader>; <http://www.webtrader.nl>.

⁸⁸ Judgment of the Court (Fifth Chamber) of 13.01.2000 in Case C-220/98 (reference for a preliminary ruling from the Landgericht Köln): Estée Lauder Cosmetics GmbH & Co. OHG vs. Lancaster Group GmbH, OJ C 79/1, 18.03.2000 and ECR (French Edition) 2000/I0117.

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THE AUTHORS

Madeleine de Cock Buning is a lawyer with De Brauw Blackstone Westbroek, P.O. Box 90851, 2509 LW Den Haag, The Netherlands. Fax: +31 70 328 5325; e-mail: mdecockbuning@dbbw.nl. Ewoud Hondius is Professor of Civil Law at Utrecht University's Molengraaff Instituut, Nobelstraat 2A, 3512 EN Utrecht, The Netherlands. Fax +31 30 253 7203; e-mail: e.hondius@law.uu.nl. Corien Prins is Professor of Law and Informatization with the Center for Law, Public Administration and Informatization at Tilburg University, P.O. Box 90153, 5000 LE Tilburg, The Netherlands. Fax: +31 13 466 8149; e-mail: j.e.j.prins@kub.nl. Marc de Vries is a Research Fellow with the aforementioned Center at Tilburg University and senior consultant with PriceWaterhouseCoopers, P.O. Box 30715, 2500 GS Den Haag. Fax: +31 70 342 6225; e-mail: marc.de.vries@nl.pwcglobal.com.