

**Tilburg University**

## **Consumers, Liability, and the Online World**

Prins, J.E.J.

*Published in:*  
Information & Communications Technology Law

*Publication date:*  
2003

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*  
Prins, J. E. J. (2003). Consumers, Liability, and the Online World. *Information & Communications Technology Law*, 12(2), 143-164.

### **General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

### **Take down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

## Consumers, Liability, and the Online World

J. E. J. PRINS

*Professor of Law and Informatization and Director of the Center for Law, Public Administration and Informatization, Tilburg University, The Netherlands.  
E-mail: j.e.j.prins@uot.nl*

**ABSTRACT** *The Internet challenges the traditional position of the consumer. In discussing the pros and cons of a European Union liability regime for suppliers of electronic services, this article analyses a possible need for a new liability regime to protect consumers in an online world. Attention is also given to possible non-legislative measures to provide consumers with an adequate level of protection given the specifics of electronic services. The article concludes with a position on whether a new European service liability regime is needed to better protect consumers in the online world.*

### 1. Introduction

Internet access, previously said to be restricted to the technocratic and mainly young elite, has widened. The potential dividends of electronic communication, digital information-gathering and electronic shopping are numerous, and many people who several years ago would have thought to have been excluded from the unprecedented opportunities, now embrace the dot.com world. With this institutionalisation of Internet access, electronic commerce has emerged as the potential emblem of a new worldwide virtual economy. In the early 1990s, few consumers had heard of e-mail, the Internet and the World Wide Web. Now an ever-increasing number of consumers use these applications as a commonplace instrument in shopping for books, flight tickets, etc. Retailers are setting up their online businesses, attracting consumers to experience the advantages of shopping in a borderless online environment. Consumers are offered convenience, speed and global choice in services, goods and, more importantly, prices.

Although the direct benefits of electronic communication—and more specifically electronic commerce—for our day-to-day lives are becoming apparent (albeit more slowly than expected), it appears far more difficult to establish some kind of consensus about expectations of the growth of electronic commerce and the implications of future developments. One reason is that there is no such thing as a common perspective on what the virtual society is all about. Hence, the success of electronic commerce also highly depends on the way we will at some point be able to grasp fully the characteristics of the virtual society.

The difficulties with describing and analysing the characteristics of the virtual world have much to do with the combination of highly different trends. The digital world has become both larger and smaller: larger in terms of competition, market reach and economic impact, and smaller in terms of time and geographical distance. Such a paradox also applies to the position of actors on electronic

markets and the power of these actors. The digital world has made individuals (consumers) both stronger and weaker. They are stronger as a result of features such as self-organisation, self-help and social interaction. However, in terms of threats to privacy, payment and concerns about new marketing techniques, access to infrastructure, services and content as well as uncertainty about jurisdictional rules, consumers have become weaker.<sup>1</sup> The new concerns become clear when, for example, reading a report of the United States Federal Trade Commission (FTC). On 31 October 2000, the FTC, in conjunction with consumer protection organisations from nine countries, wrapped up the so-called 'Operation Top Ten Dot Cons'. This enforcement effort resulted in 251 suits against online businesses and showed that the Internet is by far a safe place for consumers.

The challenges facing consumers are compounded by the fact that the Internet is marked out by various unprecedented features that these players, to their fascination and dismay, cannot tackle by means of the traditional paradigms. The well-known paradigms have all developed along the lines of physical and local bounds of space and time. These confines have, however, lost their meaning in a society that is characterised by timeless, borderless and virtual communication and interaction. Obviously, these new characteristics of the virtual world also affect the traditional framework of both national and international (European) consumer law and the interests that underpin this body of law, for most consumer law was established at a time when the information society was an unknown phenomenon.

In recent years, legislatures have subscribed to a policy of creating an environment of trust among the various users of online commerce, based on the recognition that the trust of consumers in the techniques and technologies of electronic commerce is fundamental to its development. Thus, efforts have begun towards developing laws and other initiatives for consumer protection in electronic commerce, the aim of which is to ensure that the consumer receives at least the same protection in the online world as is available to him or her in more traditional forms of commerce. Further aims are encouraging private sector initiatives that include participation by consumer representatives and emphasising the need for cooperation among governments, businesses and consumers. One example of such initiatives is the facilitation of online alternative dispute resolution systems. Various governments, encouraged among other things by the European Directive on electronic commerce,<sup>2</sup> have made a commitment to the establishment of such a low-threshold dispute resolution mechanism.

Of key importance for establishing stable legal and institutional arrangements is knowledge of the roles the various parties play on the (electronic) market and the position they have, given the characteristics of the market. Which institutions (technological, economic, legal) influence the position and bargaining power of players and to what extent? And in reverse: in which way does the use of information and communication technology (ICT) influence the legal and institutional arrangements as they have been traditionally adopted and used? One of the legal institutions that influence an actor's position in the online world relates to liability. Anyone who uses the Internet in one way or another, hence consumers as well, creates potential legal responsibility for harm caused to other actors in the online world. Thus the question arises: who is responsible for what and under which circumstances?

This article focuses on the liability position of consumers in an electronic environment. More recently, suggestions have been made to reconsider a European Commission proposal from 1990 dealing with liability for suppliers of services on the European market. This proposal was for various reasons abandoned more than ten years ago, but in light of the new implications of online service delivery it has been argued that a regulatory regime on service liability could improve the liability position of consumers in an online world.

The aim of this article is not to discuss the possible content of such a new regime. Instead, it considers the possible arguments for a specific liability regime for suppliers of services. In discussing the pros and cons of a European Union (EU) liability regime for suppliers of services, attention should first be given to the new dynamics of the consumer's position in an online world (Section 2). Subsequently, we need an overview of the current policy debate on consumer protection in an information society: what policy statements and protection measures have been issued thus far (Section 3)? In addition, attention should be given to the present liability position of consumers in an online world: to what extent and how do traditional liability regimes play a role in the protection of consumer in virtual commercial interaction (Section 4)? In subsequently addressing the question of whether the domain of (ICT-specific) liability regimes should be further expanded through a service liability regime, consideration should be given to the consumers' interests in receiving a certain level of protection (Section 5), as well as the arguments underlying the introduction of possible new measures (Section 6). Section 7 continues with a discussion of non-legislative measures to provide consumers with a higher level of protection in light of the specifics of the online world. Finally, a conclusion will be drawn on the question of whether we presently need a European service liability regime to better protect consumers in an information society (Section 8).

## 2. Consumers in the online world: changing positions?

In his book *The Control Revolution*, Andrew L. Shapiro argues that the power of institutions is shifting to individuals in the Internet age.<sup>3</sup> Dissidents use the Internet to get round the censorship rules imposed on them. Day traders do not care about the traditional institutions on the stocks and shares market and buy and sell in a matter of minutes with a single click of the mouse. School students can bring down complete global networks simply by e-mailing a single virus. The position of the consumer, a party that is traditionally and economically regarded as weak, appears to be another illustration of the changing positions in the information society.<sup>4</sup>

As also discussed in the contribution by Lucia Reisch in this issue of *Information & Communications Technology Law*, the Internet implies new risks for consumers. Although it is hard to grasp yet the exact consequences of shopping in the borderless world of the Internet, it is certain that this type of consuming is, in various ways, functioning differently from the offline world. In general, one could argue that the position of the consumer in an electronic environment is primarily weaker when it comes to issues concerning privacy, payments and transactions subject to foreign law. Consumers usually lack the opportunity to obtain sufficient information about the identity of the supplier; the terms and conditions of any transaction (including the price of the goods and services); details of delivery costs; the quality of the goods or services; and fair, timely and

affordable dispute resolution. Consumers using the Internet are usually obliged to pay entire purchase amounts in advance, while statutory regulations often explicitly forbid this practice.<sup>5</sup> Also, for transactions involving small purchases, there may be an absence of any practical means of redress in the event of a dispute. This problem is accentuated further on the Internet as a consequence of the possible cross-border dimension of the transaction.

On the other hand, the Internet appears to offer consumers important new opportunities to reinforce their positions. Key words used to reflect new consumer profiles and behaviour patterns are 'chain reversal', 'consumer sovereignty', 'mass individualism' and 'demand-based supply'.<sup>6</sup> Whereas previously producers had acted as the first creative link in the production chain and consumers (positioned at the end of the chain) could do nothing other than accept these products, individual citizens and consumers may now take the initiative and create the chain. For example, consumers can affect purchase prices on sites by collectively buying a certain product. 'Looking and (automatically) comparing' has become considerably easier on the Internet, especially when using (intelligent) search agents such as Google and MySimon. Dissatisfied consumers and patients or concerned citizens can use the Internet to make their dissatisfaction or other feelings known to a worldwide audience.<sup>7</sup> Finally, in contrast to legal enforcement instruments, the Internet offers a range of preventive opportunities with which consumers can—in principle—reinforce considerably their 'weakness' in an advance position. Illustrative in this respect are the opportunities for privacy-conscious Internet consumers to surf anonymously, make (semi-)anonymous payments or reinforce their position by means of encryption and other techniques.<sup>8</sup>

Given these and other developments, the question arises of the extent to which the consumer can still be regarded to be the 'weak' party in an electronic environment, as is the case in the traditional world.<sup>9</sup> The answer to this question is not an easy one. Although the position of, and balance between, trading partners appears to be shifting at specific points, the gross outcome of the various shifts is unclear. For—as so typical of many ICT-related processes of change—the consequences are ambivalent. On the one hand, the network economy gives consumers more power while, on the other, it renders consumers increasingly vulnerable. The Internet has improved transparency in prices and brand selection, but not so much the transparency in quality of products and services. Also, recent studies show that new online mechanisms that are claimed to reinforce the position of consumers do not work. For example, a study conducted by consumer associations shows that shopping 'bots' are biased and do not provide the independent information they claim to deliver.<sup>10</sup> After assessing the 'webcredibility' of 450 websites worldwide, the study concluded that many concerns arise when looking at site practices, the quality of information on the site and information about the site. The consumer associations stress the importance of criteria that consumers can use in determining the quality of a site as well as the information found on it.

The electronic consumer is more active, better informed and more powerful. However, the e-consumer is also more manipulated as a result of polished marketing strategies and less in control of what exactly happens with data, information and communication processes. We may thus state that at this point that no overall conclusion can be drawn as regards a possible weakening or strengthening of the consumer's position. We do, however, note that at specific

points (transparency on the conditions that apply and the characteristics of suppliers, quality of services, etc.), quality and reliability of information, privacy, payment and dispute settlement the consumer face new challenges in an online world that could certainly weaken its position.

### **3. Regulatory initiatives in protecting consumers**

Despite the lack of a clear understanding as regards the exact interrelationship between the shifts in party relationships and the overall effect of new technology on the position of consumers, various national and international governments, institutions and organisations have taken a keen interest in regulating the level of consumer protection in an online environment. It is argued that protecting the interests of consumers entering into online transactions is an essential factor in establishing trust in electronic commerce. Illustrative is the work of the World Trade Organisation (WTO)<sup>11</sup> and the Organisation for Economic Cooperation and Development (OECD).<sup>12</sup> In addition, various consumer organisations have issued recommendations, codes of conduct, certification schemes and other self-regulatory initiatives.

Being the two key players in developing e-markets, the United States and the European Union have issued various initiatives to strengthen the position of consumers. On 30 June 2000, the Electronic Signatures in Global and National Commerce Act was signed into law in the United States. In his statement on the occasion, former President Clinton referred to the 1997 Framework for Global Electronic Commerce<sup>13</sup> and remembered that this Framework also noted that government action 'may prove necessary to ... protect consumers'. The European Parliament, in its Resolution of 14 May 1998,<sup>14</sup> stressed that a high level of consumer protection constitutes a fundamental right. 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 1996,<sup>15</sup> the European Commission identified the issue of consumer protection as a key priority, questioning whether the applicable 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 European 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.<sup>16</sup> This request was mirrored in the Commission's consumer policy action plan, where it was decided to review EU legislation with a view to identifying possible loopholes and to propose any supplementary measures deemed necessary. Moreover, (the need for) such a review was acknowledged in the Electronic Commerce Directive adopted in May 2000.<sup>17</sup>

Despite the definite need for more detailed insights into the new phenomena of consuming in an online environment, the present knowledge base about the complex position of consumers in an information society remains small and shallow. This, however, has not hindered the EU in taking some substantive steps to provide for specific consumer protection measures for online business to consumer transactions, with the aim of eliminating the uncertainties faced. The most prominent examples are Directive 2000/31/EC on e-commerce<sup>18</sup> and Directive 97/7/EC on distant selling.<sup>19</sup> Both Directives provide for specific protection rules such as information requirements (which allow consumers to

obtain the name, geographic address, phone number and e-mail address of the seller) and requirements as regards (unsolicited) commercial communication. In addition to binding measures, the EU launched several initiatives to enhance consumer confidence in electronic commerce that do not carry with them legally binding force.<sup>20</sup> The most recent of these initiatives is the preparation of a recommendation on standards for an EU trust mark for electronic commerce.<sup>21</sup>

As regards the issue of liability, few ICT-specific measures have been implemented thus far. The clearest statement on the liability of players in an online world can be found in the European Electronic Commerce Directive. The question of the liability of Internet service providers (ISPs) for information and content distributed on the Internet has arisen in various countries in relation to claims in tort, defamation, intellectual property infringement and breach of content regulation laws. In light of the central role played by ISPs in distributing information on the Internet, it is widely agreed that uncertainties about their legal position need to be removed. One of the cornerstones of the new European regime is that—being considered essential to the functioning of the open networks of the Internet—ISPs should be exempted from liability for the mere facilitation of communications. Articles 12 to 15 of the e-commerce Directive delineate exceptions to an ISP's liability for the transfer or storage of illegal information in a communication network, provided that the ISP's role is merely a technical one and is limited to the technical process of operating and giving access to the network. It should be noted that the Directive only looks at the liability of ISPs and in doing so does not establish liability itself. Instead it provides for possibilities that free ISPs from liability in case of mere conduit, caching and hosting.

In addition to the e-specific European measures on liability, European consumer law has a larger body of law<sup>22</sup> containing provisions on liability. In principle, these provisions are applicable to activities and players in an online world as well. A well-known European liability regime is the Directive on products liability (85/374/EEC, amendment 99/34/EC). The Directive on the sale of consumer goods (99/44/EC) is also of relevance here. In addition, liability may arise under the Directive on data protection (95/46/EC) and in relation to the numerous European rules on commercial communications (advertising practices). Finally, mention can be made of the Directive on unfair terms in consumer transactions (93/13/EC). We will discuss the key regimes in the subsequent section.

#### **4. Liability and available European liability regimes in an online world**

As mentioned in Section 1, a person (including a consumer) who uses the Internet in one way or another creates potential legal responsibility for harm caused to other actors in the online world. Thus the question arises: who is responsible for what and under which circumstances? Examples in which responsibility and liability play a role may be the following:

- a message has been sent electronically that did not originate from the actual sender of the message, but from a false sender or was erroneously referred to the sender;

- there has been a violation of the confidentiality or the integrity of a message—in other words, an unauthorised party has (deliberately) taken cognisance of the content of a confidential message or the message has become incorrect or incomplete (e.g., during transmission);
- the transmission of a message has gone wrong or become delayed, meaning it is not delivered to the recipient or is delivered too late; and
- information that is available, or has been dispatched, electronically has been used in an unauthorised manner whereby, for example, the rules relating to protection of personal data or copyrights have been violated.

The interpretation, definition and distribution of responsibility and liability in these and other cases of electronic communication is vitally important for the development of a stable legal climate for ICT developments. The precise characteristics of the system of liability are not only important for the position of individual parties in a concrete situation, they also have implications for the actual development and creation of new digital services as well as fundamental rights such as the freedom of information and speech. Both the enormous diversity of the electronic services and the parties involved therein, as well as the cross-border and interactive nature of a large number of these services, render the problem highly complex. Legal certainty seems to be increasingly desirable, meaning that clarity is essential with regard to questions such as: Who can and must be held liable for electronic communications and operations? To whom must the operations be assigned and under what circumstances? And how can and must the source of the operations be identified? This last aspect is partly important in view of the increasing popularity of anonymity services on the Internet. After all, in this case, it may not be possible (or is very difficult) to trace the party from whom the information originates. Eventually, in addition to the legal framework, the role of the parties themselves also constitutes an important instrument for denoting both contractual and non-contractual liability.

This also shows that it is precisely the liability that results from deficiencies that cannot be traced back to a contractual relationship, but which are related to third parties (i.e., liability on the basis of a wrongful act), that entails the greatest risk when entering into electronic relationships. There are various reasons for this. First of all, it is difficult to get a grip on the risks in non-contractual relationships. After all, the risks can be covered by means of a contract in a contractual relationship. This instrument is not available in relationships with third parties. In addition, an important factor when assessing liability are considerations such as the required level of correctness, completeness and legitimacy of the data and information supplied via the electronic service. However, it appears to be difficult to get a grip on this correctness, completeness and legitimacy of the material in an electronic environment. Consequently, third parties are able to place invasive material anonymously on the Internet via an ISP and this prompts the question of to what extent is this ISP liable for the distribution of the material. In practice, it seems that liability for unlawful and illegal operations which have been carried out with the intervention of ISPs is soon placed in practice at the feet of these providers because they—in contrast to the source behind the invasive operations—can, in any event, be traced. However, to what extent is this considered a desirable development? What can



(and do) we expect from ISPs, and what then are the consequences for the freedom of information?<sup>23</sup> And finally: what is the consequence and feasibility of the chosen approach at a global level?

A subsequent question is whether the non e-specific European measures on liability that are already in place are well equipped considering the specific dimensions of the online environment. We may take the product liability regime as an example. In focusing on this regime as established under Directive 85/374 on liability for defective products, we note that liability is restricted by the nucleus of the Directive, being the term 'product'. Some argue that a product is something tangible. Thus, digital material is not a product and does not fall under the scope of the Directive. According to Article 2, the concept 'product' means all movables (with some exceptions) and includes electricity. Obviously, it is crucial to determine whether 'something delivered online' can be regarded a product, thus falling under the scope of the Directive. The issue would become easier to solve if one could determine the *ratio legis* of the inclusion of electricity under the scope of the Directive. However, the recitals fail to do so. Still, the analogy with online products is evident. Like electricity, no physical movement of goods is required. Transport of electricity is merely the creation of a magnetic field, allowing electrons to travel freely. Principally, there is no difference with online delivery where there is movement of a bit stream from the provider to the supplier. A second point of attention relates to Recital 2. It stipulates that liability without fault on the part of the producer is the sole means of adequately balancing the risks inherent in modern technological production. Nowadays, the creation of online products definitely can be regarded as modern technological production. Thus, this would be an argument to allow online products to fall within the ambit of the Directive. In addition to the definition of the term 'product', other uncertainties remain. The definition of 'producer' in Article 3(1), for example, may not be appropriate in an online environment, where the production and delivery of products is executed via a large chain of intermediaries in which various players influence the final characteristics of the product.

In the event that one comes to the conclusion that online delivery of software, music and content does not fall under the scope of the product liability Directive, the question is whether amendments or special measures are needed. Here it is important to remember an earlier proposal for a Directive on the liability of services.<sup>24</sup> This Directive, which was intended to be complementary to the product liability Directive, was never adopted. Among the arguments put forward to abandon this legislative project, the following are worth mentioning in view of online delivery of products and services. The distinction made between goods and services was justified with the argument that services are more 'individualistic', creating a more personal tie between the provider and the consumer. As opposed to products, services would be more dependent on the individual perception of the consumer, making it less objective to assess whether the service provided corresponds with the expectation of the consumer. This argument does not seem to be defensible with respect to the large range of online delivery of content, music, etc. Here, no such personal tie exists. On the contrary, we see mass production of digitised products, where real interaction between the provider and the consumer does not take place. In addition, it was argued that services lack a Community edge, since the provision of services is much more locally bound. Again this argument loses its validity in the infor-

mation society, where the provision of online products is *qualitate qua* not limited in terms of geographical area, and where the effects of product failure (viruses, privacy infringements) may be felt throughout the EU (and beyond).

A final point of attention is that the services available in the online society differ to some extent from those addressed under the proposed Directive on the liability of services. At the time the proposal was issued, the majority of the services delivered were rendered to individuals and usually not publicly available. Various online services, however, are freely available. Practice shows that setting liability standards influences information freedoms. ISPs are wary about accepting responsibility for content they make available. Simply applying traditional liability assumptions to the new online information intermediaries would ignore the highly complex issue of balancing interests, values and principles (among them information freedoms) with respect to liability for online services.

It could be argued that these arguments to refrain from introducing a specific regime for liability of services no longer apply in the present-day information society, or at least have become far more complex. If one comes to the conclusion that online delivery of 'products' such as software, content and music does not fall within the scope of the product liability Directive, the lack of a regime on liability for defective services could be considered a gap. In the event that one reaches the conclusion that online delivery of products does not necessarily fall outside the scope of the Directive, clarification is needed on a number of issues.

A glance at other European liability regimes shows that they too need clarification in view of the specifics of the online world. As is the case with the product liability Directive, the Directive on the sale of consumer goods contains a provision difficult to apply in light of online services. Article 2(b) stipulates that a 'consumer good' shall mean any tangible movable item, with the exception of water, gas and electricity. Interestingly, the Directive's recitals state that 'opportunities available to consumers have been greatly broadened by new communication technologies which allow ready access to distribution systems' and 'the development of the sale of goods through the medium of new distance communication technologies risks being impeded'. The language of Article 2(b) appears difficult to combine with the Recital. The explicit reference to tangibles and the exclusion of electricity seem to lead to the conclusion that the online sale of products such as content, software and music fall outside the scope of the Directive, thus not imposing any liability (by virtue of this Directive) on the provider.

The situation has become even more complicated in the light of the adoption of the e-commerce Directive. According to this Directive's Recital 11, the sale of consumer goods Directive applies in its entirety to information society services. Does this mean that the e-commerce Directive has enlarged the scope of the sale of consumer goods Directive? Whatever the answer is, it is beyond doubt that the applicability of the sale of consumer goods Directive in the online context requires clarification, particularly in view of the adoption of the e-commerce Directive.

The overall conclusion must be that the applicability of the available European regimes on liability in consumer relationships in an online environment needs further study and clarification. Only when this has occurred can an answer be given to the question of whether we need additional rules (e.g., by means of a specific services liability regime). Among the issues that subsequently needs to

be addressed in gaining a further understanding of consumer protection is what should be the touchstone when assessing whether specific liability regimes are needed in view of consumer protection in an online world? What should be the *cadre de reference* in respect of the liability expectations a consumer may have in an online environment? Is the consumer's actual knowledge (Internet wisdom) of importance? Attempting to answer the latter question brings us to the notion of the 'legitimate expectations of consumers in an online world'.

### 5. Legitimate expectations of consumers in an online world

It is generally understood that the 'legitimate expectations of the consumer' constitute the framework for the protection of the consumer.<sup>25</sup> These expectations operate, for example, in privacy law,<sup>26</sup> contract law and the law on misleading advertising.<sup>27</sup> A criterion like this could at first sight be of use in determining the level of consumer protection needed in an online world. Illustrative is the 18 December 2002 decision of the Provincial Court of British Columbia, Canada. The court ruled that a user agreement on Merrill Lynch's brokerage website could not be enforced because the company's computer system could not provide 'the reasonable level of performance' to which a customer is entitled.<sup>28</sup> The customer used Merrill Lynch's NetTrader facility to sell his shares online and lost a considerable sum due to mistakes in the cancellation of a transaction. Merrill Lynch denied any responsibility for the incident claiming that it had placed disclaimers on its website. The court, however, ruled that the disclaimers in dispute were deemed to be an agreement that 'virtually eliminates liability for inaccuracy in the performance of the services contracted for by the customer' and were thus unenforceable. In so ruling, the court argued that:

an electronic system which is incapable of giving to a customer a simple instruction that he should not continue with a request for a trade or cancellation until he or she is advised specifically that the request has been successfully and completely dealt with, or that his transaction is pending until he is advised to the contrary, is ... a faulty system, and does not provide that 'reasonable level of performance' that a customer is entitled to receive from that system and for which he is contracted.

Interestingly the customer was not a consumer, but a software engineer, meaning that the 'legitimate expectations' criterion is applicable to a broader range of actors than mere consumers.<sup>29</sup>

A key question that needs to be answered then is what exactly constitutes the legitimate expectations of the consumer in an online environment and, more specifically, what do these imply in view of liability positions? Could the adage 'what applies offline, should apply online' act as a starting point here? In other words, do the notions and principles that determine liability in an offline world sufficiently meet the expectations of the consumer in an online world? Arguably, the consumer would not expect things to be completely different from his or her experiences with liability in an offline world.

However, offline rules do not completely cover new technologies and their implications. The Internet provides for circumstances and risks that are unknown in the offline world and may therefore call for new approaches to the existing body of law on liability of consumers. We have seen above that the role

of consumers is less univocal in the online world. As was discussed, the classical distinction between consumer and producer appears to blur in certain situations. An interesting question here is whether a consumer that shops for certain services and information on the Internet is (or should be) a better informed (and more emancipated) consumer than the offline consumer? The answer to this question is of relevance when considering that, in determining whether a description of a product or service is liable to mislead the purchaser, for example, the Court of Justice of the European Communities takes into account 'the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect'.<sup>30</sup> Could it be that the outcome of this test differs between the online and the offline world in some cases? In other words, can consumers on the Internet, being active information seekers, be presumed to be more reasonably well informed, observant and circumspect than purchasers in the offline world?

Certain characteristics of Internet use do appear different and could point towards differentiating between the online and offline worlds when it comes to the reasonable expectations of a consumer. Bullinger, for example, questions whether national protective measures for auctions should also be applied to auctions on the Internet where more time and deliberation is possible than during a real auction.<sup>31</sup> Clearly, several years ago the adage 'what applies offline, should apply online' appeared an adequate starting point in dealing with the newly emerging legal problems in the online world. At present, the issue appears much more complicated and there is a definite need for more detailed insights into the pros and cons of applying the adage. Such insight is also required to determine what exactly constitutes the 'legitimate expectations of the consumer in an online environment', and what these expectations imply in view of liability positions. Aside from the considerations related to the legitimate expectations of consumers, other arguments should be considered as well when analysing the necessity of new legislative measures on consumer liability given the specifics of the online world.

## **6. Arguments underlying European legislative initiatives**

When the EU legislature proposes new measures it does so arguing that these measures are required in the light of certain interests. In glancing at the expansive body of law that has been issued at the EU level, one notes that the European Commission justifies its initiatives on a limited set of oft-cited arguments. Usually, these arguments relate to economic considerations. In some situations other considerations are mentioned, such as certain societal interests (e.g., the fundamental rights argument was the key reason to legislate on personal data protection) or enforcement interests (e.g., the initiatives in the area of alternative dispute resolution). In trying to cluster the various arguments, we find those that underscore the interest of stimulating certain processes (e.g., competition on the Internal Market) and those that relate to protecting interests (e.g., consumer protection, privacy protection, societal and public interests). In deliberating the possible argumentation for adopting an EU service liability Directive, it would be interesting to discuss the 'popular' arguments used by the EU legislature in earlier initiatives.

### 6.1 Uncertainty

A first argument often used by the European Commission in proposing harmonisation measures is that it provides the required legal certainty. Differences between national law systems are not desirable and harmonisation of national laws is necessary to provide sufficient legal certainty. Applied to consumer liability in the online world, this new market knows no frontiers and is characterised by its high mobility. In such a global environment, consumers should not be dependent on (extremely) variable legal rules regarding liability they know nothing about. Illustrative are the arguments brought forward by the European Commission in Consideration 5 of the e-commerce Directive:

The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the international market which make it less attractive to the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services.

The Commission also used the argument in its Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual provisions into a Community Instrument and its modernisation.<sup>32</sup>

Outside the EU setting, the argument of removing legal uncertainty is also often heard when justifying certain initiatives. Mention can also be made of the arguments underlying the drafting of a model law on electronic commerce in the context of the United Nations Commission on International Trade Law (UNCITRAL). This project was mainly directed at removing improper legal obstacles in the global market by adopting a set of uniform international rules. Promoting the predictability of the law and increasing its practical applicability were seen as key considerations.

To some, the argument of promoting legal certainty is founded on the logic that a European or global market (and thus European and global market players) needs uniform regulatory regimes. Nevertheless, other authors have argued that diversity in rules may bring important benefits as well. 'The lawyers' blind concern for legal certainty diverts their attention away from the important benefits of competition between legislators. Such competition may initiate more efficient rules.'<sup>33</sup>

Another basic presumption underlying the argument of promoting legal certainty is that all legal regimes are relatively similar in their tradition as regards the level of consumer protection and subsequent regulatory instruments used. This is clearly simplistic. The level of legal certainty that actually can and will be realised may vary greatly, depending on numerous factors, such as the level and scope of regulation, the legal tradition, the subject matter and the discretionary powers of Member States in implementing and interpreting the international rules. Hence, in order to know what degree (and what kind) of harmonisation is realistic in aiming at legal certainty for consumers, it should be closely assessed just what level of legal certainty is called for given the economic interests at stake and what factors and circumstances influence the actual realisation of harmonisation.

### 6.2 Minimum level of legal security or legal protection

Faced with the problems and disadvantages of far-reaching European harmonisation, the EU sometimes adopts a less stringent position when addressing the problem of diverging rules between Member States and aims at finding a middle road between European uniformity and national diversity of regulation. EU rulemaking is here confined to implementing minimum standards of protection or minimum rules. A precondition is that all affected jurisdictions would indeed agree on the threshold set by the European legislature. As regards consumer protection, it was mentioned in the previous section that, considering their specific position, consumers acting in a global online environment must in any event be accorded a certain minimum level of protection. Illustrative is the 2001 Green Paper on consumer protection arguing for 'a comprehensive, technology-neutral, EU framework directive to *harmonise national fairness rules* for business-consumer commercial practices' (emphasis added).<sup>34</sup> A glance at the proposed Directive on services liability shows that a key justification of the European Commission's proposal to shift the burden of proof in cases involving services is that such a measure is required in view of the standard of consumer protection. The Commission refers to the 9 November 1989 Council Resolution in which the safety of services is clearly connected to a relaunching of the consumer protection policy.<sup>35</sup>

We also find the argument of establishing a minimum level of protection in international organisations' policy initiatives or in national documents referring to required global initiatives. For instance, in setting an example for a minimum international standard on consumer protection in the area of e-commerce, the OECD issued the Consumer Protection Guidelines.<sup>36</sup> A soft law example here is the work of the European Commission on a standard for an EU trust mark for e-commerce.<sup>37</sup> In the area of personal data protection, mention can be made of the French Government's suggestion for establishing, by means of an international treaty at a worldwide level, a set of minimum data protection principles that could provide for a uniform mechanism among different countries in the prosecution of consumer protection standards. These minimum principles could be further elaborated in the various nations by means of self-regulation.<sup>38</sup>

In adopting this argument, European and international rulemaking is confined to implementing minimum rules and combines the best of both (i.e., combining national and international regulation as well as formal and informal regulation). The disadvantage is, of course, that online actors cannot merely rely on the international minimum regulatory framework, but will have to consider the additional national rules and regulations as well. Thus, the various national regulatory systems remain to differ.

### 6.3 Unbalanced competition on markets

A third argument that is often found relates to unbalanced competition. Differences between national legal systems can affect the conditions on how products and services are presented at the various markets. This implies that the competitive positions of the market players in the different countries are unbalanced. In other words, variations in national regulatory regimes would adulterate the best possible working of the global online market. Harmonisation of law is an

instrument in harmonising market conditions. The argument is a popular one in justifying the regulatory initiatives of the EU. The argumentation of the European Commission is that differences in national laws may obstruct competition within the internal market for information services. The Commission uses the argument in its proposal for a Directive on services liability when it argues that the existence of different standards in service liability rules among the Member States creates barriers to trade in services. The argument could be very well applied to different national standards on electronic services as well. For example, competition between service providers might be unbalanced in the situation that in one country unclear standards exist as regards liability (which may constitute an incentive for not making any effort to know about content), whereas in another country the problem is solved (e.g., through case law) and clear guidelines exist as regards the situations where control over content is required (thus requiring a provider to implement filtering software). In general, we note that when looking at the numerous Directives that have been issued in the area of ICT, the argument of unbalanced competition is advanced to justify almost all measures.

The argument of unbalanced competition due to differences in national legal systems implies that there is a close relationship between the harmonisation of legal regimes, on the one hand, and market entry conditions, on the other. Legal subject matter outside the domain of ICT, however, shows that such a relationship is often very difficult to prove. In general, there is a lack of empirical evidence regarding what extent variations between national legal systems obstruct market competition and what the positive effect of harmonisation measures would be. Illustrative is the report of the European Commission on the practical effects of Directive 85/374 on liability for defective products.<sup>39</sup> The European Commission acknowledges in the report that the effect of the European Directive on liability for defective products on the harmonisation of market conditions cannot be proved. First, 'only little information about the application exist and statistics, if available, are not complete'. In addition, the harmonisation legislation is often merely an additional layer to an already existing body of (substantive and procedural) national law. In the words of the Commission: 'In most Member States, the national rules implementing the Directive are applied alongside other liability regulations in the majority of the cases.'<sup>40</sup> Thus the 'traditional' legislation stays intact irrespective of the European measures and it is the 'traditional' body of law that influences to a large extent the actual market conditions.

Mention should also be made here of the regime on liability of ISPs under the European e-commerce Directive (discussed in Section 3 above). In introducing this regime, the Directive only provides for possibilities that free ISPs from liability in case of mere conduit, caching and hosting and in doing so does not establish liability itself. This issue is left to the national liability regime of the individual Member States.

As regards the specific issue of this article—the possible introduction of a service liability Directive—mention must also be made of the conclusions of Curran, who from a law and economics perspective, concluded that the proposed services liability Directive would have 'the detrimental effects of increasing the amount of insurance bundled in services prices and of decreasing the quantity of services demanded'.<sup>41</sup>

#### 6.4 Administrative burden

A final argument is that harmonisation would lead to a simplification of the rules applicable in an online world. Companies and other actors engaged in international online activities will be better informed of or acquainted with the governing legal rules. This may save on information costs and thereby result in a reduction of the overall costs that companies incur when conducting online business. Benefits from uniform international rules can also arise from a reduction in court costs in case a dispute arises. This argument was used by the European Commission for providing a uniform system on services liability in the EU. A reduction of costs appears of importance for the further development of new markets because in the end consumers will pay the costs. It was also this argument that was forwarded in the debate on the revision of the Brussels Convention of 1968<sup>42</sup> and the ongoing discussion on the revision of Article 5 of the Rome Convention of 1980.<sup>43</sup>

Similar to the argument mentioned earlier of unbalanced competition, no empirical support has been given for this justification for harmonisation. The argument's use has therefore been criticised in legal literature.<sup>44</sup> The exact impact of international harmonisation efforts on costs appears highly difficult to assess.<sup>45</sup> Many other factors and developments have their influence on administrative costs and no research seems available on the potential impact of harmonisation measures on price setting. The introduction of an expanding and increasingly complex body of (albeit harmonised) law may very well lead to an increase in costs instead of a decrease (an often-heard claim with respect to the European data protection Directive). The cost of accommodating a concept foreign to a national legal culture (legislation, case law, training) could outweigh the claimed information and administrative advantages of harmonised rules. In any event, the argument that international rule-making results in a reduction of administrative costs would require a cost-benefit analysis that not only shows the benefits of a simplification of the applicable rules between the different countries, but at least also includes the different costs.

The above discussion on the oft-used arguments in favour of implementing harmonised legislative measures to protect the interests of consumers shows again that answering the question of whether the online society needs harmonised rules to protect consumers in view of services liability is far more complex than usually claimed. In an analysis of the rules on services liability as proposed by the European Commission in 1990, Faure describes the complexity of the matter and the many relevant distinctions that must be made in considering the topic of services liability (contractual liability versus tort liability; situations where parties can or cannot negotiate on risks, price as well as the level of duty of care, influence of insurance etc.).<sup>46</sup> And even when one opts for formal EU harmonisation of national rules on services liability, we still face 'the well-known and structural problem that formal harmonisation will in practice still have to overcome the asymmetries between legal traditions. Harmonisation requires "harmonising interpretation".'<sup>47</sup> Are other instruments available for protecting the position of consumers in the light of possible liability for online activities? Can a certain level of protection be realised by means other than mandatory harmonisation?



## 7. Non-legislative measures

On 8 December 1999, the European Commission launched the initiative 'eEurope: An Information Society for All', proposing ambitious targets to bring the benefits of the information society within the reach of all Europeans. Whereas the 1988 action plan mentioned three key objectives focusing on ten priority areas, the eEurope Action Plan (released after the Lisbon Summit of the European Council on 19–20 June 2000) expressly mentions the enhancement of consumer confidence as a prerequisite for the further development of e-commerce. In order to do so, the action plan, *inter alia*, proposes:

- (1) to stimulate the adoption of pending legislative initiatives (draft Directives on copyright, financial services, e-money and jurisdiction),
- (2) to provide sufficient incentives for consumer groups and businesses to establish self-regulatory rules (particularly in the area of alternative dispute resolution),
- (3) to increase flexibility in electronic commerce regulation by building on self-regulation through cooperation with business groups, and
- (4) to improve legal certainty for small and medium-sized enterprises.

Sadly, the initiative is rather disappointing from a consumer perspective. Although it is aimed at creating a high level information society with the participation of all European citizens, the consumer role of a citizen seems to be hardly covered: 'building consumer trust' is mentioned in one of the objectives, but it has not been substantiated any further in the 10 priority areas. The suggestions made under points (2) and (3) testify that 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.<sup>48</sup> The codes of conduct issued by various organisations are well-known examples of such self-regulatory measures.

When considering the issue of online services liability an important role may be assigned to consumer associations and other consumer interests groups. In what way may and can such organisations enhance consumer confidence and address the consumer's position in view of liability?

### 7.1 Making the consumer's voice heard

A first measure would be to make the consumer's voice heard. Of course, this is easier said than done. In what way can the voice of the consumer be heard, how should it be amplified throughout Europe and in what way can consumer organisations play a role therein, taking into account the developments—most importantly: internationalisation, the fading role of the legislator and the emergence of new and intensified communication modalities—within the context of the information society? Traditionally, consumer organisations<sup>49</sup> have played an important role in the development of consumer protection. The technological, social and economic developments related to the dawning of the information society affect the role of consumer organisations. The traditional roles of such organisations (one-way information provision, legal actions and lobbying) are complemented by new services emerging. All over the world, consumer organisations are gradually changing their core activities, gearing them towards the requirements and new possibilities set by the information society. Most promi-

nently three areas require attention: consumer associations as active collectors, processors and disseminators of information; consumer associations as facilitators, bringing together consumers, businesses and policy makers; and consumer associations as stakeholders in (self-)regulatory initiatives.

As regards their position as active collectors, processors and disseminators of information, new ICT applications (websites and e-mail) allow for interactive communication between the consumer and the organisation representing his or her interests. Transferring information has become two-way traffic, instead of one-way. Subsequently, the focus of action could shift towards more proactive and preventive initiatives (as opposed to solving specific conflicts). In line with this, consumer organisations are well placed to establish platforms where the main players can (virtually) convene.

## *7.2 Trust marks*

Consumer organisations, as well as other consumer interest groups and associations, may play an important role in influencing the terms and conditions under which consumers contract on electronic services. After all, individual consumers are usually not in a position to negotiate with providers of electronic services and goods concerning the way in which they provide their services and thus the liability arrangements that apply between service provider and consumer. Also, individual Internet consumers are not capable of scrutinising the policies of organisations, companies and other participants in a virtual world without borders. In short, interest groups must consider it their task to give consumers a voice at a strategic level or provide them with instruments with which they can exercise their rights.

The representatives of consumers have a range of instruments at their disposal. Partly these are instruments already used in the traditional world. However, new forms of old instruments or completely new modes are available as well. As far as the old instruments are concerned, a reference should be made to negotiations on general terms and conditions. Consumer representatives can help to fashion the applicable rules as a party involved in negotiations on general terms and conditions. It is in this way that applicable regulations can be incorporated into the general negotiations on general terms and conditions at branches at which a lot of electronic transactions are carried out remotely. As far as traditional instruments are concerned, intermediary organisations are also used in procedures for the treatment of complaints and regulations on disputes.

A glance at the activities of the various interest groups reveals that they are, at the moment, actively involved in the realisation of more transparency for grassroots users with regard to the various rights and obligations on the Internet. Important instruments in this context are codes of conduct and quality seals or trust marks. A variety of consumer organisations in European countries launched a quality mark for commercial websites backed by a code of conduct. A provider of electronic services that carries the trust mark logo undertakes to observe the conditions formulated by the consumer organisation or interest group. The EU-funded project of consumer associations in eight Member States to develop a national quality seal for sales conducted via the Internet is illustrative in this respect.

As mentioned in Section 3, the EU is now preparing a Recommendation on standards for a EU trust mark for electronic commerce. Providers of sale-services

complying with the requirements are allowed to use the trust mark logo on their website. Consumers stumbling upon this logo on a website could duly accept that the service offered is consumer friendly. If not, complaints can be lodged with the relevant consumer organisation. The conditions underlying the trust mark are easily accessible for consumers and businesses via the Internet. What is important in relation to these conditions is the freedom of choice for consumers, the simple price-quality comparison and the transparency of the transaction conditions.

### *7.3 Sweeps*

Numerous interest groups use the Internet themselves as a mechanism for their activities. The Internet has given them a new 'instrument of negotiation'. Illustrative is the so-called 'sweeps' that involve organisations (often as a joint activity with partners in other countries) scouring the Internet in search of fraudulent and misleading practices. E-mails are sent to suspicious sites informing them that their activities do not comply with applicable legislation and regulations, along with a summons to adapt the site. One could refer, for example, to the activities of the so-called 'Better Business Bureaus'.<sup>50</sup>

### *7.4 Alternative dispute resolution*

Once a dispute arises involving electronic services and questions are asked about the liability for damages caused by, for example, neglect of a service provider's duty of care in providing the service, it would be an important advantage for consumers if the threshold of the dispute resolution facility is low. In view of this, various experiments have been undertaken to realise low-threshold facilities for alternative means of solving disputes using digital techniques (e.g., e-ADR (alternative dispute resolution) or ODR (online dispute resolution)). Various institutions and providers (such as the e-bay auction site) have developed electronic facilities for the settling of disputes. The European Commission regards this as a crucial instrument for the improvement of the position of the electronic consumer and has also developed a wide range of related activities designed to encourage e-ADR. Nevertheless, critical voices have also been heard which refer in particular to the fact that many aspects have yet to be developed in more detail. Examples of such aspects are the rules applying to the access to, and authenticity of, the documents submitted; the deadlines that apply to the submission of the documents of the case; the way in which the arguments are expounded; and the way in which the judgement is to be signed. Moreover, decisions have to be taken regarding the status of online judgements.<sup>51</sup>

## **8. Conclusion**

The following observations may be made about the liability position of consumers in an electronic environment. As was been mentioned in Section 1, there has been a suggestion that European Commission proposal from 1990 dealing with liability for suppliers of services on the European market be reconsidered. More than ten years ago, this proposal was abandoned for various reasons, but

in light of the new implications of online service delivery it has been argued that a regulatory regime on service liability could improve the liability position of consumers in an online world. This article's discussion has shown that consumer protection initiatives and legislation has become commonplace, either general in scope or aimed at particular areas of mischief, such as liability. In analysing to what extent these established consumer protection rules apply online, we noted that the regimes need clarification on several issues. In addition, the discussion showed that although the Internet offers consumers new mechanisms to strengthen their position, they also face specific problems and uncertainties when shopping for products and services online. In a nutshell, the principles and rules of consumer protection and, more specifically, those dealing with liability as they apply in the offline world should perhaps differ from those applicable to the online world. The questions that subsequently need to be answered are: how much consumer protection is required in the online world? Should the new level of protection be realised by means of (harmonised) formal rules or can other, self-regulatory mechanisms play a role?

Section 5 showed that a key mechanism in determining what level of protection is required is the concept of the 'legitimate expectations of the consumer'. The discussion of this concept in light of the specifics of the online world, however, showed that by now it is far from clear what exactly constitute the 'legitimate expectations of the consumer in an online environment' and what these imply in view of liability positions. Section 6 made clear that answering the question of whether the online society needs harmonised formal rules to protect consumers in view of services liability is far more complex than usually claimed.

Given these and other uncertainties in direct (harmonised) government regulation in the area of electronic services liability, less direct methods of control could be considered. Thus, a first approach to protecting consumers on the Internet would better be to push for information and transparency as regards liability positions, as well as other mechanisms for proper liability conducted by means of self-regulatory mechanisms such as codes of conduct, trust marks, etc. Consumer associations and other consumer interests groups may play a key role in stimulating, implementing and controlling such mechanisms. It is clear that—given the cross-border character of Internet transactions—the various interest groups cannot operate exclusively from a national perspective. They will also have to cooperate at an international level. Such cooperation is indeed taking place. Illustrative is the International Marketing Supervision Network (ISMN)<sup>52</sup>—a global form of cooperation between consumer organisations from dozens of countries. Other bodies too, such as the International Society of Consumer and Competition Officials (ISCOO), are trying to improve the position of their members on the global digital market.

In brief, we may conclude that for the moment there seem to be a limited number of well-considered arguments for law reform in aid of the liability issues discussed in this article. The underlying arguments on the legitimacy of the legislative effort, as well of the effects, need to become clearer and further study seems to be in order. Such studies need to consider questions and arguments of the interrelation between (political) economy, technology and law. In the meantime, the traditional legal tools remain available and the potential of self-regulatory practices needs to be further explored and tested.

## Acknowledgement

The author wishes to acknowledge the Dutch National Programme for Information Technology and Law (part of the Dutch Scientific Council–NWO) for making this article's research possible.

## Notes

1. See, e.g., on these problems and concerns, the 1999 comparative study produced by Consumers International, *Consumers@shopping: An International Comparative Study of Electronic Commerce*. Available online at: [www.consumersinternational.org/campaigns/electronic/e-comm.pdf](http://www.consumersinternational.org/campaigns/electronic/e-comm.pdf).
2. Article 17 of the e-commerce Directive (2000/31/EC) encourages the 'use of out of court schemes, available under national law, for dispute settlement, including appropriate electronic means'. 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 electronic commerce, *OJ L 178*, 17 July 2000.
3. A.L. Shapiro (1999) *The Control Revolution: How the Internet is Putting Individuals in Charge and Changing the World We Know* (New York, Century Foundation).
4. See also, C. Girot (2001) *User Protection in IT Contracts: A Comparative Study of the Protection of the User Against Defective Performance in Information Technology* (Den Haag/Boston, MA, Kluwer Law International).
5. After all, full payment in advance brings consumers into a disadvantageous position with regard to retribution of the purchase price if the goods supplied do not comply with the agreed requirements.
6. V. Frissen (2001) *De nieuwe kleren van de keizer? De economie van de 21<sup>e</sup> eeuw vanuit consumentenperspectief* (Den Haag, Ministerie van Economische Zaken); Ministerie van Economische Zaken (2001) *Bloei door Kennis en Keuze. Startdocument voor het project Economie van de 21<sup>e</sup> Eeuw* (Den Haag, Ministerie van Economische Zaken).
7. See *The Economist*, 6 November 1999, pp. 84–86.
8. Whereby, incidentally, it currently applies that these privacy protection techniques are often only 'available' to mainly technically competent users. More and more forms of encryption techniques are, however, becoming standard software components, while in the near future encryption will also be applied as a standard at the network level (IPv6, version 6 of the Internet Protocol).
9. See also, B. van Klink & J.E.J. Prins (2002) *Law and Regulation: Scenarios for the Information Age* (Amsterdam, IOS Press).
10. See [www.consumersinternational.org](http://www.consumersinternational.org).
11. See the report entitled '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.
12. The OECD issued, in December 1999, the *Guidelines for Consumer Protection in the Context of Electronic Commerce*. Available online at: [www.oecd.org/dsti/sti/it](http://www.oecd.org/dsti/sti/it).
13. White House (1997) *A Framework for Global Electronic Commerce* (Washington, DC, Government Printing Office), 1 July 1997.
14. 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*, 1 June 1998.15. 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) 395 final, 24 July 1996.
16. Resolution of the Council of 19 January 1999 on the Consumer Dimension of the Information Society, *OJ C 023/1*, 28 January 1999.
17. 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 electronic commerce, *OJ L 178*, 17 July 2000.
18. See Note 17 above.
19. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect to distance contracts, *OJ L 144*, 4 June 1997.
20. See, e.g., the European Commission's e-Confidence Forum: <http://econfidence.jrc.it>.

21. The standard is expected to take the form of a Recommendation. *Electronic Commerce & Law Report*, 29 January 2003, pp. 90–91.
22. For an overview and analysis of all relevant European measures on consumer protection, see the study entitled *Study on Consumer Law and the Information Society*, which 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, Brussels August 2000. See also the article based on this study by M. de Cock Buning *et al.* (2001) *Consumer@Protection.EU: An Analysis of European Consumer Legislation in the Information Society*, *Journal of Consumer Policy*, 24, pp. 287–338.
23. See, on this in detail, M.H.M. Schellekens (2001) *Aansprakelijkheid van Internetaanbieders* (Den Haag, Sdu); R. Julià-Barceló & K.J. Koelman (2000) *Intermediary Liability in the e-Commerce Directive: So Far So Good, But It's Not Enough*, *Computer Law & Security Report*, 4, pp. 231–239.
24. The European Commission submitted this proposal on 9 November 1990 to the Council, *OJ* 18 January 1991, C 12/8–12/11.
25. G.G. Howells & T. Wilhelmsson (1997) *EC Consumer Law* (Aldershot, UK, Dartmouth Publishing), pp. 18–19.
26. On the concept of 'a reasonable expectation of privacy', see *United States v. Katz*, 389 US 347, 1967.
27. See C-210/96 (*Gut Springenheide and Rudolf Tusky v. Amt für Lebensmittelüberwachung*): 'In order to determine whether a statement ... is liable to mislead the purchaser, the national Court must take into account the presumed expectations which it evokes in an average consumer' (emphasis added).
28. *Wei Zhu v. Merrill Lynch HSBC*, 2002 BCPC 0535. The decision is available online at: [www.provincialcourt.bc.ca/judgments/pc2002/05/p02%F0535.htm](http://www.provincialcourt.bc.ca/judgments/pc2002/05/p02%F0535.htm).
29. Girot concluded several years ago that an extension of the criterion to 'weak parties' appears necessary considering the specifics of contractual relationships in the information society (Girot, *User Protection in IT Contracts*, footnote 5).
30. C-220/98 (*Estée Lauder v. Lancaster Group*). See, on court cases before *Estée Lauder*, R. Sack (1999) *Die Präzisierung des Verbraucherleitbildes durch den EuGH, Wettbewerb in Recht und Praxis*, 4, pp. 399–402. Of course, the concept of the 'presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect' does not seem to hold true for all types of consumers. Certainly where matters of confusion or offensive material are at stake, a concept like this should not always be a primary criterion. Certainly, the concept will not hold for vulnerable groups like children.
31. W. Bullinger (2000) *Internet. Auktionen. Die Versteigerung von Neuwaren im Internet aus wettbewerbs. rechtlicher Sicht, Wettbewerb in Recht und Praxis*, 3, p. 253.
32. Brussels, 14 January 2003, COM (2002) 654 final.
33. R. Van den Bergh (1998) *Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law, Maastricht Journal of European and Comparative Law*, 5, p. 130.
34. Green Paper on European Union Consumer Protection, 2 October 2001, COM(2001) 531 final (emphasis added).
35. Christopher Curran (1994) *The Burden of Proof and the Liability Rule for Suppliers of Services in the EEC, Geneva Papers on Risk and Insurance* (January), p. 86.
36. See Note 12 above.
37. See Note 21 above.
38. Conseil d'Etat (1998) *Internet et les réseaux numériques*, p. 44. An English version of the report can be found online at: <http://www.internet.gouv.fr/francais/textesref/rapce98/accueil.htm>.
39. Report from the Commission on the application of Directive 85/374 on liability for defective products, Brussels, 31 January 2001 COM(2000) 893 final.
40. Report from the Commission on the application of Directive 85/374 on Liability for Defective Products, Brussels, 31 January 2001 COM(2000) 893 final, p. 8.
41. Curran, *The Burden of Proof*, p. 96.
42. The Brussels Convention was replaced (as of 1 March 2002) by Regulation 44/2001, *OJ* L 12, 16 January 2001.
43. See the Green Paper on the Rome Convention, Brussels, 14 January 2003, COM (2002) 654 final.
44. See, e.g., Van den Bergh, *Subsidiarity as an Economic Demarcation Principle*; Curran, *The Burden of Proof*.
45. Curran, *The Burden of Proof*, p. 96.
46. M. Faure (1994) *Enkele rechtseconomische kanttekeningen bij de dienstenaansprakelijkheid, A&V*, 2, pp. 33–41.

47. J. Spier & O.A. Haazen (1999) The European Group on Tort Law ('Tilburg Group') and the European Principles of Tort Law, *Zeup Zeitschrift für Europäisches Privatrecht*, 3, pp. 489–490.
48. See also, J. Noll (2002) European Community & e-Commerce: Fostering Consumer Confidence, *Electronic Communication Law Review*, 3, pp. 207–219.
49. In Europe, many consumer organisations and networks of these organisations are active. Each country has one or more national consumer association. Many of them are members of the BEUC, the European umbrella organisation. Consumers International is the global umbrella organisation. Most of the national consumer association and the BEUC are also members of this global organisation. Moreover, in 1995, the Commission established the Consumer Council, in which the national consumer associations and some European organisations are represented. Furthermore, the transatlantic Consumer Dialogue is a forum of American and EU consumer organisations. It develops and agrees on joint consumer policy recommendations to the United States government and the European Union in order to promote consumer interests in policy making.
50. <http://www.bbb.org>.
51. See the response of the Bureau Européen des Union de Consommateurs, *Consumers' Rights in Electronic Commerce: Jurisdiction and Applicable Law on Cross-border Consumer Contracts*, Brussels, 9 May 2000, p. 5.
52. More on this organisation can be found online at: <http://www.imsnricc.org/imsn/activities.htm>.