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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE ECONOMIC AND SOCIAL COMMITTEE

concerning regulatory transparency in the internal market for information society services

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Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations

(presented by the Commission)

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Executive summary

1. The purpose of this communication and of the accompanying proposal for a Council Directive is to establish at Community level a procedure for the provision of information and the holding of consultations on possible future draft rules and regulations on Information Society services.

2. As part of its general policy on the Information Society, the Commission is keen to develop a legal framework enabling *inter alia* the new services which will be provided in the Information Society to benefit from the opportunities afforded by the area without internal frontiers, while bearing in mind both the fundamental objectives to be pursued in the general interest and the social, societal and cultural factors that come into play. These services will be (or already are) highly diverse and include electronic newspapers, distance education or healthcare services, distance tourism services, the distance selling of goods and services by electronic means, distance betting services, interactive games and leisure activities, etc. The feature they all have in common is that they are provided electronically at a distance and are intended to meet one or more specific requests by an individual service receiver. Owing to this latter characteristic, the services are "interactive" inasmuch as the provider responds to specific requests from a receiver and vice-versa.

3. The area without internal frontiers is a key factor in the development of these services as it will enable them to cross borders, thereby providing ordinary citizens with new ways of communicating and receiving information, consumers with new, reliable forms of access to goods and services, and the European service supplying industries with new opportunities to increase their competitiveness.

4. At present, these services are not developing in a legal vacuum: the body of law governing the Internal Market, in particular Articles 52 (freedom of establishment) and 59 (freedom to provide services) of the Treaty and the existing secondary legislation, already constitutes a basic legal framework. However, those involved in the considerable amount of analysis that has been undertaken on the subject at both national and Community level (studies, reports and think tanks) agree that the current national rules and regulations applicable to existing services need to be adapted to take account of the peculiarities of the new Information Society services, and predict a surge of regulatory activity in this area. Indeed, these services might give rise to different risks from those covered by the existing rules and regulations on traditional services or on television broadcasting or telecommunication services. Accordingly, it will be necessary to amend the existing rules and regulations either to allow then to better safeguard the general interest or, instead, to scale them down where their application is no longer justified. Moreover, the intense interest in the Information Society confirms that we are on the eve of a substantial alteration to the regulatory framework.

5. Without co-ordination at Community level, there is every reason to believe that these new rules and regulations in the Member States will be highly divergent from one Member State to another, each of them being motivated by concerns of their own stemming from a different perception of the general interest objectives

to be pursued. This future regulatory activity thus creates a serious risk of refragmentation of the Internal Market, that is to say, of the introduction of new, unjustified or excessive obstacles to the free movement of services between Member States and to the freedom of establishment for the providers of such services, which might, moreover, have repercussions at Community level in the form of overregulation or mutually inconsistent regulations.

At the same time, in view of the cross-border dimension of the new services, isolated, uncoordinated national initiatives might prove ineffective in terms of protecting legitimate general interest objectives and might well lay themselves open to circumvention, notably through geographical relocation and "forum shopping" by the operators concerned.

6. There is, therefore, a clear need for co-ordination at Community level of this future regulatory activity in order to forestall any such refragmentation of the Internal Market and to pursue more incisively general interest objectives that are worthy of protection. It would be premature, for the purpose of achieving such co-ordination, to propose extensive and exhaustive harmonisation at Community level of the substantive rules applicable to Information Society services, without, of course, prejudice to those fields that are already subject to specific Community regulation such as, for example, the telecommunications sector. In general, not enough is known about the form, nature and market development of these new services for it to be possible to determine the need for, and content of, such harmonisation in the light of the Internal Market. The Commission accordingly proposes to co-ordinate these future rules and regulations by means of an information, consultation and administrative co-operation procedure.

Obviously, this does not preclude in certain specific areas, the launching of work to examine the need for action at Community level with a view to safeguarding certain general interest objectives.

7. The procedure laid down in respect of draft rules on goods by Directive 83/189/EEC of 28 March 1983 already pursues precisely the objective of establishing a co-ordination procedure. The fact that more than ten years' experience has been gained in applying this Directive demonstrates its effectiveness, since it is the most extensively used regulatory transparency mechanism to date. The administrative co-operation it provides for and the procedures it lays down are perfectly suited to the needs raised by Information Society services. The Commission accordingly proposes to widen the Directive's scope so as to include draft rules and regulations on Information Society services.

8. The proposal for an extended Directive pursues several objectives:

- *permitting the smooth functioning of the Internal Market particularly by preventing the creation of new obstacles* via the exchange of information between Member States and between Member States and the Commission. Depending on the issue at hand, this information exchange will make it possible either to forestall the appearance of national rules and regulations that are incompatible with the principles of free movement of services and

freedom of establishment, or, where the national rules envisaged are likely to result in justified legal barriers pursuing general interest objectives worthy of protection, to detect the need for new Community rules aimed at removing those barriers;

- *ensuring more effective safeguarding of general interest objectives* by anticipating the need for Community intervention aimed at ensuring an adequate, equivalent level of protection between Member States. The domestic concerns which may induce a Member State to legislate may be shared by other Member States and may be more effectively met by co-ordinated protection at Community level;

- *establishing more clearly and reducing the need for new Community rules and regulations* by permitting a more effective application of the Treaty, in particular Articles 52 and 59 thereof, and of Community law, together with closer co-operation between the Member States. A transparency mechanism would make a valuable contribution here by making it possible, *upstream*, to prevent or limit the adoption of certain domestic laws which subsequently could give rise toregulation, at Community level in an attempt to validate them which was not really necessary;

- *facilitating administrative co-operation* at the stage of the drafting of rules and regulations by encouraging the national legislator to ask other national administrations about the situation in the other Member States so as not to legislate in isolation without regard to experience gained elsewhere and the impact on service providers and receives established in other countries;

- *contributing to the stability of the regulatory framework*, first of all by limiting the risk of unforeseeable regulatory reactions, secondly by avoiding the periods of uncertainty resulting from infringement proceedings brought against Member States for failure to fulfil their Community obligations, and thirdly by enabling operators, competent national authorities and consumers to have more information about, and contribute to, draft rules and regulations potentially affecting them.

9. The transparency mechanism would cover draft national rules, except those aimed at implementing any Community Directive, whether present or future, on the taking-up and pursuit of service activities where the services are provided by electronic means at a distance and on the individual request of a service receiver (element of "interactivity"). .

10. The transparency mechanism should, as far as possible, be supplemented by regulatory and administrative co-operation procedures at international level with a view to establishing a stable, coherent regulatory framework on a broader front.

11. The proposed transparency mechanism reproduces the procedural measures laid down in Directive 83/189/EEC:

- *a procedure for the provision of information* on draft rules and regulations on the services defined above: the Member States would have to communicate to the Commission any draft provision which will be applicable to Information Society services. The Commission will forward the information to all the other Member States in order to make them aware of national initiatives;

- *a consultation procedure*: following notification of the draft rule or regulation, an initial standstill period of three months starts to run during which the Member States and the Commission may make comments or deliver a detailed opinion (in which case the total standstill period is extended to six months), or, in the case of the Commission, declare that a future harmonisation proposal will be presented or that it has already proposed harmonisation measures in the field concerned (in which case the total standstill period is extended to twelve months and may be as long as eighteen months).

- *a committee*: the committee of Member States' representatives already provided for in Directive 83/189/EEC will enable the authorities to stimulate a dialogue between Member States' legislators and promote administrative co-operation. At a time when in many Member States talks on the legal framework for services are already under way, the committee might constitute a particularly useful forum in which the authorities can meet and express their views.

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INTRODUCTION

The Commission's policy on the Information Society was defined in its action plan entitled "Europe's way to the Information Society: an action plan".[1] As part of this general policy on the Information Society, in March 1995 the Commission defined its regulatory policy in relation to Information Society services, that is to say, the various services that will be carried on the information superhighways.[2] A full range of interactive services will be made available to consumers, including, for example, electronic newspapers, distance learning, distance legal and healthcare services, distance tourism services, electronic commerce involving goods and services, distance betting services, interactive games, leisure services, etc.

These services are, in general terms, characterised by the fact that they are provided at a distance, by electronic means, and are intended to satisfy one or more specific requests by an individual service receiver. Owing to this latter characteristic, they are "interactive" services inasmuch as the provider can react to specific requests from a receiver and vice versa. These services, hereinafter referred to as "Information Society services", are therefore different from television broadcasting services in that the consumer can interactively gain access to them, manipulate them, and choose and control their content in order that they might meet his own distinct requirements. However, they also differ from traditional professional services which normally require the provider or receiver to travel to or from the home (e.g. medical, legal or educational services) in that they are provided at a distance by electronic means. The social, societal, cultural and economic implications of this diversity of services are clear: ordinary will above all be afforded new opportunities for transmitting and receiving information regardless of frontiers or distances; a dynamic economic sector will come into being; and such services will be the main *raison d'être* (apart from the development of telecommunication services proper) for the development of information networks and technologies in the European Union. There are also clear implications for European integration inasmuch as, by doing away with the distance factor, such services will be a means of achieving an ever-closer union among the peoples of Europe and of establishing closer relations between the States belonging to the Union.

In this context, the frontier-free area of the Internal Market is a key factor in the success of the Information Society as the considerable investment needed to develop such services will be undertaken only if it is possible to achieve economies of scale, target niche markets, and distribute the services throughout Europe. Thus potential markets which at national level are too small to be profitable may become interesting if they are exploitable in all the Member States.

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1 Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee and the Committee of Regions, COM(94)347 final, Brussels, 19 July 1994. The action plan was drawn up following the Corfu European Council (24-25 June 1994), which stressed the need for creating "a clear and stable regulatory framework" for the Information Society and which invited the Commission to establish as soon as possible a program of measures needed at the Community level to complete the regulatory framework. Previously, the report by the High-Level Group on the Information Society, chaired by Mr Bangemann, had stressed the importance of adopting a single legislative approach which was both consistent and relevant and at the same time flexible enough to evolve with the new technologies and new markets.

2 "Information services - Establishment of a regulatory framework". Memorandum from Mr Bangemann, Mr Oreja and Mr Monti, adopted on 22 March 1995. See also the explanatory memorandum accompanying the proposal for a Directive amending Directive 89/552/EEC, COM(95)86 final of 31 May 1995, p. 27.

The Commission's regulatory approach to Information Society services must be designed precisely to meet these challenges by ensuring a clear, secure and coherent legal framework. In this respect, the Commission considers it would be both premature and risky to seek, at this stage, to lay down extensive and specific Community rules on these new services. Indeed, inasmuch as their form, nature and development on the market are still unknown quantities, not enough is known about the needs and problems which might justify Community action. Moreover, there is no legal vacuum since existing Community law and, in particular, the rules governing the Internal Market already constitute a basic legal framework.

However, this by no means implies that action is not called for. It is already clear that the development of the Information Society will in future be accompanied by new rules and regulations at national level which will alter the existing legal framework. If this regulatory activity is not co-ordinated at Community level, a refragmentation of the area without internal frontiers, overregulation and regulatory inconsistencies might ensue to the detriment of the development of Information Society services and of the pursuit and effective safeguarding of the relevant general interest objectives.

It is to counter these risks that the Commission has decided that one of the priority measures at Community level must be, at this stage, to organise this future regulatory activity by proposing a regulatory transparency mechanism which seeks to ensure the transparency of future draft national rules and regulations and their compatibility with the principles of the area without internal frontiers and the other objectives pursued.

This does not imply that the Commission will not present other specific initiatives. The Commission has already clearly envisaged this possibility, first by deciding that future Community regulatory initiatives will have to be anchored in the legal framework of the Internal Market and respect the principle of regulatory consistency, and secondly by launching preparatory work in the form of the analysis of, or the organisation of consultations concerning, specific questions which have already been identified with a sufficient degree of accuracy. The Commission has thus recently adopted three Green Papers: the Green Paper on *copyright and related rights in the Information Society*,[3] the Green Paper on *legal protection for encrypted services*, and, finally, the Green Paper on *commercial communications in the Internal Market*, all of which have been or are the subject of in-depth consultations. Two other Green Papers are also being prepared, one on *living and working in the Information Society* and another on *the development of the new audiovisual services*, which will deal with the question of the safeguarding of certain general interest objectives, notably the protection of minors and the promotion of cultural and linguistic diversity, and the question of the development of the new audiovisual services.

The regulatory transparency mechanism proposed hereinafter represents therefore an important step in the establishment and organisation of the legal framework of the Information Society and is motivated by the desire to ensure that the service industries derive suitable benefit from the area without internal frontiers. It thus forms part of a coherent policy aimed at ensuring a balanced development of the Information Society

[3] COM(95)382 final of 19 July 1995.

which takes account of the variety of general interest objectives concerned, notably those relating to social, societal and cultural aspects.

It is also an essential means of enabling the Community to take part more effectively and consistently in the debate and in the handling of regulatory issues of the Information Society in the context of international co-operation.

I. INFORMATION SOCIETY SERVICES IN THE INTERNAL MARKET

The development of the regulatory framework for the Information Society is closely linked to the market for services. It would appear that we are on the eve of a significant expansion of that market in Europe (A) and that a basic legal framework (B) is already in place.

A. Towards a European market for services

The new national rules and regulations will depend to a large extent on the development of the market for services in the Information Society. As these services arrive, one by one, on the market or as their forthcoming arrival impacts on public opinion, regulatory needs will arise. It is therefore essential first of all to identify the key characteristics of the development of the market for those new services which are likely to have an impact at the regulatory level.

1. A wide diversity of services

All the services currently known or being developed and a large number of new services exploiting new possibilities might form part of the Information Society. The common denominator of all Information Society services will be the special role played by the final consumer in the chain, and more precisely the fact that the marketing, sale and/or distribution of the services will be provided to the consumer at a distance, by electronic means and on his individual request.

In the light of these key factors, the range of services proposed by the Information Society is immense. Already, the on-line services offered and planned for sale on the market cover a great many fields. Active both in the more innovative fields and in the more traditional fields (health, education, publishing, consumer goods, etc.), operators have already begun to evaluate and exploit the opportunities afforded by the inclusion of direct electronic interactivity in their relations with consumers. In the light of current analyses,[4] the following examples can be given of services already available or planned for the future:

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[4] See, for example:
EUROPEAN INFORMATION TECHNOLOGY OBSERVATORY (OETI), "European Information Technology Observatory 95", Germany, 1995; LAURENT ABRIL and others, "Développement d'un environnement multimédia en Europe: Besoins pour le développement d'un Environnement Multimédia fondé sur les Infrastructures de Télécommunications et les Réseaux de Télévision par Cable". Final report for DG XIII of the European Commission, DEVOTECH Conseil and ANALYSIS, January 1995; EUROPEAN IT INDUSTRY ROUND TABLE, "Multimedia in the Fourth Framework Program", Workshop report, Brussels, June 1, 1994; MINISTRY OF POSTS AND TELECOMMUNICATIONS, "Reforms toward the Intellectually Creative Society of the 21st Century, Program for the Establishment of High-Performance Info-Communications Infrastructure", Japan, May 31, 1993; ZENITH MEDIA, "New Interactive Media: The Practical Guide", Zenith Media, April 1995; AFTEL, "La télématique française en marche vers les autoroutes de l'information", Les éditions du téléphone, Paris, 1994; THIERRY BRETON, "Les téléservices en France: Quels marchés pour les autoroutes de l'information?", Official Report to the Minister of State, the Minister for the Interior and Regional Development and the Minister for Enterprise and Economic Development, JOUVE, Paris, 1994; INSTITUT MULTIMEDIAS; "Multimedias made in USA", Multimedia seminar, Paris, March-April 1995.

- *Electronic commerce*: often called, confusingly and incorrectly, "teleshopping" or described as an "electronic purchasing system", electronic commerce would enable the consumer to order products directly via his television set or computer terminal.
- *Distance teaching*: distance teaching would be provided interactively; it would rely on an audiovisual aid and would enable the student to answer questions, choose alternatives, and receive an assessment of his/her abilities.
- *Electronic publications/information services:* this term covers a wide range of services such as news, weather reports, on-line databases, etc. For services such as travel information or information about the times of various events, one of the possibilities often offered by electronic commerce is direct booking.
- *Professional teleservices*: professional services such as telemedicine and legal advice afford an expert the opportunity of giving advice from his place of work to his client's home with total interactivity between the two.
- *Home banking*: clients can obtain information about their accounts and carry out financial transactions directly and at a distance via a/the network.
- *On-line entertainment*: this includes services such as on-line video games or video-on-demand which would enable the consumer to order a programme or a film at any time, watch it on his screen and manipulate its content (ranging from fast winding or rewinding to making wholesale changes).

The range of services planned today is, however, just the tip of the iceberg. The common advantages of all these services mentioned above could apply to virtually all currently existing services:

1. *Greater proximity to the consumer*: the ability to reach the consumer wherever he happens to be and to afford him the opportunity of receiving information or purchasing and/or receiving a product/service on the spot saves him the time and trouble that are associated with a traditional service.

2. *Direct reaction of the consumer*: inasmuch as the link and the exchange of information between the service receiver and the service provider can be much more intense, the service provider can gain a much better idea of his client's profile and hence personalise his offer.

3. *The instantaneous universal scope and internationalisation of the geographic market*: since physical distance no longer matters in the case of an on-line connection, the service provider can just as easily reach a client on another continent as in the next street.

Any attempt to name or categorise the services would, by definition, be artificial, incomplete and extremely temporary as it would necessarily be based on the markets, products, services and economic realities of today which are likely to change tomorrow. The forecasts of the various types of Information Society service which might be made available in future are constantly being updated. Depending on their purpose, various categories are drawn up, based, for example, on the features of the application (professional, consumption-related, educational or healthcare, etc.) or on the type of medium (PC, TV, etc.) or distribution network (satellite, cable, telephone, wireless,

terrestrial, copper/fibre, CD-ROM, interactive kiosks,[5] the Internet,[6] etc.). None of them is, however, really satisfactory and lasting in view of the fact that no limit to the potential of the Information Society of tomorrow can be determined with sufficient clarity today.

At the regulatory level, the first conclusion to be drawn is that the scope of the regulatory sphere will necessarily be as wide as that of the economic sphere.

2. *A gradual development of markets*

The Information Society will not start with a "big bang". Although the possibilities are enormous, Information Society services are emerging only gradually. New applications are constantly being developed and tested (on-line shopping, telebanking, distance education, video-on-demand, etc.) and pilot projects financed by private and public funds are being launched throughout the world. The reason for this gradual development is the length of time it takes service providers to respond to the many challenges, in particular:

- *Attracting the consumer*: resistance to change has to be overcome, especially in the case of services intended for those categories of consumer who are the least aware of the new technologies (e.g. the older generation as opposed to the younger generation, the mass market as opposed to the business market).

- *Finding means of payment*: the services will not be able to expand until payment mechanisms have been developed which facilitate easy and direct electronic payment. Thus, it is those services for which the method of payment is the most simple (e.g. services provided on closed networks) that are developing the quickest.

- *Finding and developing commercially exploitable applications of technologies*: services based on the most advanced technologies will take off only when the application of those technologies becomes commercially viable and/or sufficiently widely available for the consumer to be ready to pay the asking price for the new service.

- *Redesigning distribution*: if the product needs to be physically transported or if a complementary service has to be performed manually, a completely new distribution concept must be developed whose advantages are on a par with those of speed and proximity offered by the Information Society services.

- *Overcoming regulatory obstacles*: the unsuitability of the national legal framework (see below) will in many cases make it expensive to develop services owing to the legal uncertainty or the need to find favourable regulatory niches, and in some cases will even make such development impossible.

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5 Computers to which the public have access, normally specific to one company, affording access to information via a choice of menus, under the control of the user. Possibility of live video conference with an "expert" from the kiosk.

6 An ownerless open system based on the ARPANET network originally ordered by the US Defense Department in 1969. Its core structure is currently managed by Advanced Network & Services (ANS), this system in its present form serves some 4 million users and provides E-mail access to at least 30-40 million individuals over more than 160 countries. In some parts of Europe, the number of users of the network has increased by more than 1 000% in the last three years.

- *Defining schemes for rendering operators liable* : it will be important to differentiate between the obligations of providers of on-line services networks or cable networks and those of providers of services and editors of the content, and to set out the ethical and moral rules which the latter must observe.

The opportunities and challenges are evolving and are perceived differently by operators in the various areas of economic activity, and it is impossible to determine exactly at this stage which application/technology combinations will give rise to profitable markets and precisely how profitable those markets will be. The first applications are and will be those for which the necessary adaptations are the most simple and least costly (e.g. electronic publishing, personalised interactive news, on-line marketing, etc.) and/or for which the benefits to the consumer should be the greatest (e.g. electronic shopping, on-line financial services, distance teaching, medical services provided at a distance, video-on-demand, etc.). With the passage of time, however, a growing number of "traditional" services will be modernised and redesigned and entirely new services will be developed.

At the regulatory level, the gradual nature of the development of the market means that the new regulations will not come into being all at once, there being instead a strong likelihood that they, too, will be spread out over a period of time.

3. Geographic differences in the development of the new markets

At the European Union level, it can be expected that there will be different levels of development of Information Society services from one Member State to another. There are various reasons for this :

- *differences between Member States in the level of diffusion of information technologies* , broadly reflected in the graph below by the IT quotient[7] (by which the country which has the lowest quotient would theoretically have the highest penetration level for computers and telecommunications, and the highest levels of economic activity);

- *differences between Member States in the growth of the information technology markets*. Given that national markets are not developing at the same rate, the differences between Member States will diminish in some cases and increase in others;[8]

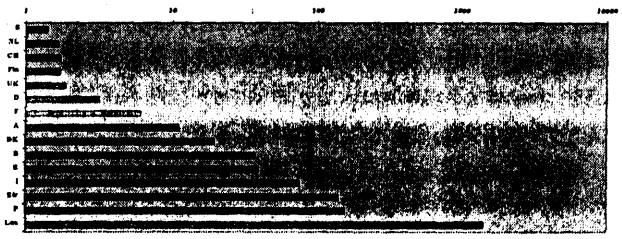
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7 IT quotient = (OE + PM + CP + PC + TP + FM + PG)/(GDP*Host*NSF). OE representing total expenditure on office equipment in 1990 (in US$); PM representing the number of mailings in 1990; CP representing the number of new cellular telephone subscribers in 1994; PC representing the number of computers in service in 1993; TP representing the number of telephones in 1990; FM representing the number of fax machines in service in 1992; PG representing the number of pagers in service in 1992; GDP representing gross national product per head in 1995 (estimates in US$); Host representing the number of computers connected to the Internet in October 1994; NSF representing the sum of the net income and expenditure of the NSF in 1994, in US$ millions.

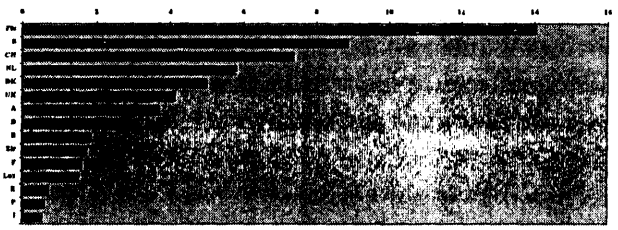
8 See the table on the rate of growth in information technologies by region between 1990 and 1994 in OETI, already cited, p. 357.

- *differences between Member States in the types of service that will develop*, reflecting differences in the current characteristics of the market due to historical, socio-political, demographic, geographical and technological factors. This difference in the characteristics of the underlying markets is already apparent (e.g. the degree of interest shown in the market for Minitel services in France and that shown in advanced satellite television services in the United Kingdom) and is mirrored in the available information infrastructure (e.g. the different use made of cable distribution and of the telecommunications network, as illustrated below by the penetration of connections via the Internet).

IT quotient[9]



Internet connections per 1 000 inhabitants[10]



At the regulatory level, this differing development of services across geographic markets will in all probability be translated into different national regulatory approaches.

4. *An inevitable growth in the level cross-border services*

Information Society services differ from "traditional" services in that they can be provided regardless of the distance between the consumer and the provider. Exploitation of this inherently cross-border nature will be essential to the development of Information Society services owing to a combination of the following factors:

- *attaining critical mass and reducing marketing costs*: whereas in the case of "traditional" services the advantages connected with the cross-border provision of services and trade in goods in a wider geographic market often remain unexploited owing to the cost involved (time, transport, distribution, collection of data, etc.),

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9 Eric Arnum, "Internet Cross-Subsidisation: Traffic, Spending and Government Spending on the Internet. A close-up study of the commercialization of the Internet and the growth of the NSFnet Backbone Service from January 1993 to January 1995", Report to the Commission of the European Communities, 1995.

10 Source: Société Internet. Observatoire Européen de l'Audiovisuel.

Information Society services, by abolishing the distance factor, considerably reduce this cost (to an extent which depends on whether or not the products need to be delivered or interpretation costs, etc.);

- *meeting specialised requirements and targeting niche markets*: the interaction between the service provider and the individual consumer enables the provider to gain a competitive edge by meeting, as closely as possible, the needs of individual consumers. As a result, the consumer increasingly expects to be able to find products/services which precisely meet his requirements. For the service provider, this means that specialisation and personalisation are increasingly important. Generally speaking, small service providers will have to exploit the global geographic market in order to create economically viable niches. Larger service providers active in markets for more standardised products/services might offer a higher level of personalisation if the service is itself adaptable (e.g. information or education services); in the case of services which have relatively fixed characteristics (e.g. video-on-demand, on-line shopping, etc.), it will be necessary to offer a wider range of choice if service providers are to justify their subscription, that is to say to offer "bouquets" of services. In all these cases, the possibility of covering a wider geographic market becomes a crucial requirement.
- *accessing niche markets across frontiers*: the Information Society has started to develop in each Member State, but more among some segments of the population than among others (e.g. the younger generation as opposed to the older generation, business users as opposed to private users, etc.). It follows from this that the nationality of the market matters less than the segment of the market, and that, in order to be able to achieve a big enough market to make the provision of services commercially viable, these segments will have to be reached and accessed as a niche market across national frontiers.

The consumer will be quick to demand these cross-border services owing to their positive impact:

- *Much easier and wider access to all services/products existing in the European Union*: thanks to a substantial reduction in the cost of searching for products and services within the Union, markets which used to be inaccessible due to their remoteness are rendered as accessible as domestic markets.
- *A reduction in the cost of the service provided*: in view of the increased competition between service providers and the resulting greater ease with which prices can be compared, downward pressure will be exerted on price levels.
- *New, more specialised/personalised services*: thanks to the geographic market being wider, consumers will be able to link up to more specialised and personalised services (e.g. information services or education services tailored to the consumer's individual requirements) and there will be a greater number of new products/services from which to choose.

At the regulatory level, the need for the cross-border development of services underscores the fact that it is essential that the frontier-free area be fully guaranteed.

B. The current legal framework of the Internal Market

The European market for services is not developing at present in a legal vacuum. The existing body of law governing the Internal Market already constitutes a basic legal

framework. Full and effective application of the principles of the freedom of establishment (Articles 52 *et seq.* of the Treaty) and the freedom to provide services (Articles 59 *et seq.* of the Treaty) and of the existing secondary legislation already enables Information Society services to benefit from the opportunities afforded by the area without internal frontiers.

Article 59 of the Treaty, which lays down the principle of the freedom to provide services,[11] plays a key part in facilitating and encouraging the creation of a critical mass of cross-border services transported along the information superhighways. As is explained in the "Commission interpretative communication concerning the free movement of services across frontiers",[12] this principle prevents a Member State from restricting the freedom to provide services originating in another Member State. According to Article 59 and the case-law of the Court of Justice, a service must comply with the law, and is subject to the control, of the Member State of origin, that is to say, that in which the service provider is established. Owing to this country of origin control system and the system of mutual recognition that flows from it, providers of Information Society services will therefore in principle not be obliged to apply different regulatory provisions depending on the final destination of the services, as this would, in a Union of 15 Member States, purely and simply be tantamount to denying the existence of an area without internal frontiers. There will, however, be a need for harmonisation where application of the law of the country in which the service is received is justified for reasons relating to the public interest.[13] In this case, it will be necessary to establish a level of protection of the public interest that is equivalent among all Member States so as to remove such a legal barrier.

An approach based on effective application of Article 59 and of the country of origin control system (mutual recognition) will reduce the need for secondary legislation. In many cases, direct application of Article 59 will indeed suffice to prevent Member States from restricting the freedom to provide Information Society services. It is only where a restriction is justified in the light of the case-law of the Court of Justice that secondary legislation might be necessary. In other words, the stricter the application of Article 59, the less need there will be for Community rules.

Article 52 of the Treaty is also relevant as far as Information Society services are concerned because it guarantees the providers of such services the benefit of the right of establishment. This means that a provider of Information Society services who is

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11 The concept of service is defined in Article 60 of the Treaty: "Services shall be considered to be 'services' ... where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.". In addition, Article 59 states that the principle of freedom of movement applies to cross-border services: "... restrictions on freedom to provide services within the Community shall be progressively abolished ... in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.".

12 OJ C 334, 9.12.1993, p. 3.

13 Restrictions on freedom to provide services may be justified under certain conditions: discriminatory restrictions may be justified only on the grounds set out in Article 56 of the Treaty and subject to respect for the principle of proportionality; non-discriminatory restrictions may be justified by overriding reasons relating to the general interest. Any restrictive measure must, all the same, be proportional to the objective pursued (the measure must be appropriate and not go beyond what is necessary for attaining that objective).

established in one Member State and who wishes to establish himself in other Member States should not be subject to discriminatory restrictions, disguised discriminatory restrictions, or, in certain cases, non-discriminatory restrictions.

The secondary legislation governing the Internal Market already comprises a number of Directives which will play a major part in the development of Information Society services. These Directives are intended, as are all "Internal Market" Directives, to safeguard the general interest, to the extent necessary to remove obstacles to the Internal Market, by establishing an equivalent level of protection in all Member States.

Reference may be made in particular to the recent *Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data,*[14] which shows the "value added" of Internal Market legislation in terms of the protection of fundamental rights in the Information Society, in this case the right to privacy. Although this Directive has a scope which extends well beyond the Information Society, it nonetheless represents a key stage in the establishment of its legal framework inasmuch as the protection of personal data is an issue deemed crucial to the development of Information Society services. It also represents a substantial step forward in the drive to promote confidence in the new services among ordinary citizens. As information technology develops, the Commission will consider and, if appropriate, propose such additional measures as may be necessary. Mention should also be made of the proposal for a Directive on the protection of personal data and privacy in the context of digital telecommunications networks, in particular the integrated services digital network and digital mobile networks,[15] which governs the specific problems connected with digital telecommunications networks.

With regard to intellectual property, several Directives will play a key role, in particular *Directive 91/250/EEC on the legal protection of computer programmes,*[16] *Directive 92/100/EEC on rental right and on lending right and on certain rights related to copyright in the field of intellectual property,*[17] *Directive 93/83/EEC on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,*[18] and *Directive 93/98/EEC harmonising the term of copyright and certain related rights.*[19] *Directive 96/6/EC on the legal protection of databases*[20] is also of fundamental importance and might serve as a

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14 Adopted on 24 October 1995.

15 Amended proposal COM(94) 128 final of 13 June 1994. See also Article 22(4)(d) of the proposal for a Directive on the application of open network provision (ONP) to voice telephony, common position of 12 July 1995 (OJ C 281, 25.10.1995, p. 19).

16 OJ L 122, 1.5.1991, p. 42. It is of particular importance because computer programs are fundamental to the information superhighways. The Directive grants copyright protection to computer programs *qua* literary works.

17 OJ L 346, 27.11.1992, p. 61.

18 OJ L 248, 6.10.1993, p. 15. It lays down common rules on copyright, notably with regard to the collective administration of rights, of which certain elements may prove relevant to the legislative proposals concerning the information society.

19 OJ L 290, 24.11.1993, p. 9. It is a cornerstone of the legal framework needed to protect the works and performances which will be broadcast on the information superhighways.

20 OJ No L 77, 27.3.1996, p.20. Adopted on 11 March 1996, this Directive seeks to harmonise copyright as it applies to the structure of databases in whatever form, whether on-line or off-line, and to introduce a new economic right protecting the substantial investment by the manufacturer of a database.

basis for any future additional initiative concerning those aspects of copyright and related rights which relate to the Information Society.

The *Green Paper on "copyright and related rights in the Information Society"*[21] is an initial response to analyses which have identified the intellectual property field as one of the key regulatory fields as far as the emergence of the Information Society is concerned. The specific character of digital technology, which makes it possible to transmit and copy a large amount of data much more easily than in the traditional analogue environment, brings with it specific risks. Without adequate protection, it is difficult to ensure that a work or service is not copied, modified or exploited unbeknown to, and to the detriment of, the rightholder. The Green Paper seeks to launch a wide-ranging consultation exercise with a view to determining future policy in this area.

The Green Paper on "legal protection for encrypted services in the Internal Market"[22] surveys the problems stemming from the regulatory disparities between Member States in relation to the protection of such services against piracy and the risks to the functioning of the Internal Market which might arise therefrom in the context of the Information Society. The Green Paper mentions the possibility of Community action aimed precisely at harmonising national laws in this field.

The Green Paper on "commercial communications in the Internal Market"[23] discusses the various forms of advertising, direct marketing, sponsorship, sales promotion and public relations that are intended to promote products and services and their prospects for future development in the context of the advent of the Information Society. The Green Paper examines the extent to which national rules, though not discriminatory, are nevertheless capable of hampering cross-border activity, notably on networks, in this type of service, and proposes a method for assessing the proportionality of such rules and improving co-ordination between possible initiatives at Community level.

The *proposal for a Directive on contracts negotiated at a distance*[24] will assume, as far as the protection of consumers is concerned, obvious importance in relation to some new services, notably electronic commerce.

Lastly, *Directive 89/552/EEC on "television without frontiers"*[25] guarantees the free movement of television broadcasts, and these will also benefit from the cross-border broadcasting facilities made available by the new Information Society technologies. This Directive covers so-called conventional television broadcasting services as well as "pay per view" or "near video on demand". The present initiative does not prejudge the discussions within the European Parliament and the Council on the review of the Directive, including its scope. In so far as some new services would be included within the Directive's scope, these services and the draft rules relating thereto will not be covered by the transparency mechanism in view of the fact that the prior notification

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21 COM(95) 382 final of 19 July 1995.

22 COM(96) 76 final of 6 March 1996.

23 COM(96) 192 final of 8 May 1996.

24 Proposed revision, OJ C 308, 15.11.1993, and OJ C185 of 19.7.1995, p4.

25 OJ L 298, 17.10.1989, p. 23. Proposal for an amendment dated 31 May 1995, COM(95) 86 final;; Modified proposal. COM(96)200 of 7.5.96; Common position of 8.7.1996 and Communication form the cOMMISSION AND THE Parlaiment SEC(96)1292 on the Common position.

procedure does not apply *inter alia* to national rules implementing a Community Directive.

II. THE NEED FOR A TRANSPARENCY MECHANISM

The need for a transparency mechanism stems from the regulatory activity that will gain momentum at national level in the years ahead with a view to regulating Information Society services; if it is not co-ordinated, this regulatory activity might lead to the Internal Market being called into question, notably through a refragmentation of the area without internal frontiers.

In addition, a problem of discordance arises between, on the one hand, the limited territorial scope of national rules and, on the other, the transnational dimension of the new interactive services which, as a result, need to be discussed extensively and call above all for co-operation at Community level.

A. The outlook for regulatory activity in the Member States

Developments in Information Society services will be reflected at the legal level by new regulatory needs. The setting-up of think tanks in the Member States and the many official reports and studies that have been commissioned at national or Community level lead to the same conclusion: the Information Society necessitates regulatory action on a broad front aimed at adapting the current legal frameworks.

1. Preregulatory mobilisation in the Member States

In a number of Member States, work has begun on analysing and assessing future regulatory needs in the Information Society.[26] This is symptomatic of the beginnings of regulatory activity. In the light of the information in the Commission's possession, the work in hand may be summed up as follows:

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26 The following studies can be cited by way of example: Thierry Breton: "Les télé-services en France. Quels marchés pour les autoroutes de l'information?" Official report to the Minister of State, the Minister for the Interior and Regional Development and the Minister for Enterprise and Economic Development (France, December 1994); Jean-Marc Detailleur: "Evolution de la presse écrite dans la perspective des nouvelles technologies multimédias". Report to the Minister for Communication (France, December 1994); Gérard Théry: "Les autoroutes de l'information"; Report to the Prime Minister (France, July 1994); "Industries culturelles et nouvelles techniques"; Report by the Committee chaired by Mr Sirinelli, Minister for Culture and the French Language; Prognos AG: "Digitales Fernsehen-Marktchancen und ordnungspolitischer Regelungsbedarf", commissioned by the Bayerische Landeszentrale für neue Medien (Munich, January 1995); Coudert Brothers: An overview and analysis of the legal and regulatory barriers to the take-off of multimedia applications in preparation for the infrastructure Green Paper (Report to the European Commission, December 1994): The Danish Government report on the Information Society year 2000; Actieprogramma Electronische Snelwegen "van metafoor naar actie" (Official document of the Dutch Government, December 1994); "Wings to human ability" (Official report to the Swedish Government (August 1994)); Titan: Study of the regulatory framework of the French-speaking community for the launching of multimedia experiments and workshops "Le contrôle des accès et des droits" (Belgium, November 1994 and January 1995); "Creating the superhighways of the future: Developing Broadband Communications in the UK" (presented to Parliament by the President of the Board of Trade by command of Her Majesty: November 1994): The Waterloo Report on "Transatlantic Dialogue on Broadcasting and the Information Society", 19- 21 May 1995; Informationsgesellschaft Chancen, Innovationen und Herausforderungen, Festellungen und Empfehlungen. Der Rat für Forschung, Technologie und Innovation, Dezember 1195; a number of recent resolutions of the International Communications Round Table (ICRT) have also stressed certain regulatory needs.

- ***Belgium***

Fifty or so individuals from various spheres of the communications industry are working on "Titan", a project to introduce the new technologies in the French-speaking community. A "legal" subgroup is examining certain questions, such as intellectual property law, data security, the rules of evidence, consumer protection and the safeguarding of privacy. A preliminary report for the Titan group on the regulatory framework, drawn up in November 1994, states that a complete remodelling of the existing regulatory system is extremely desirable, and expresses the hope that a thorough review might ensure consistency among the rules and regulations governing these new services. With a view to drawing up rules on interactive services, the "Conseil Supérieur de l'audiovisuel" has been asked to analyse the issue and produce proposals. In the Flemish-speaking community, talks are being held on draft amendments to a Decree of 4 May 1994 governing broadcasting/television in the context of the "Telenet Vlaanderen" project. This is a project which is being carried out jointly by the Government, quasi-public bodies and private enterprise and which is aimed at the new cable distribution services.

- ***Germany***

Several think tanks have been set up, either at Land or at federal level,[27] and are examining among other things the specific question of the regulatory framework for Information Society services and questions relating to data protection, crime prevention, the protection of minors, intellectual property, the protection of consumers, encryption, and media ownership. The German Christian-Democrat Party, and the Social-Democrat/Bündnis 90/Die Grünen parties, have established think tanks[28] to study the legislative issues and the need for adaptation of the rules. The Bundestag has decided to set up a commission of enquiry to look into regulatory matters among others.[29] One of the questions still outstanding is whether the new services come within the terms of reference of the *Länder* or of the Federal Government. Recently the *Länder* agreed a draft Treaty on on-line services (On-line Staatsvertrag) which is based on the broadcasting Treaty (Rundfunkstaatsvertrag) between the *Länder*. The draft[30] contains provisions on the taking-up of the activity, identification of the service-provider, editorial responsibility, the protection of minors, advertising, sponsorship, the right to reply, data protection, supervision, etc. For its part, the Federal Government has published guidelines on a new multimedia law[31] which addresses issues relating to freedom of access without a license, consumer protection, the publishing of supply and pricing conditions, liability, the protection of minors, contract law including digital signature, intellectual property rights, etc.

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27 For example, the "Forschungs- und Technologierat" of the Federal Government, a group of representatives of the 16 *Länder* and of the Federal Government; the "Petersberger Kreis", formed by the Government and economic operators. Preliminary reports are expected for the autumn.

28 Cf., for example, the 12 media-policy demands of Bündnis 90/Die Grünen of 9 and 10 September 1995, calling for rules on the new services in the areas of data protection, privacy, minors, intellectual property and consumers.

29 In this context, attention has been drawn to the fact that the existing body of rules and regulations should be slimmed down so as to be more in keeping with the new requirements.

30 Staatsvertrag über Mediendienste.

31 Statement vom Bundesminister Dr Jürgen Rüttgers zu den rechtlichen Rahmenbedingungen für neue Informations- und Kommunikationsdienste - Multimedia Gesetz - 2/5/1996.

- ***Denmark***

In October 1994 the Ministry of Finance, which is responsible for *"The Information Society 2000"*, presented a governmental report which concluded inter alia that the Danish law on the protection of personal data should be revised and simplified to cope with the changes brought about by the Information Society. The report asks that the discussion on the various aspects of the Information Society be treated as a matter of priority by Parliament and by local authorities, and that an action plan containing future initiatives be drawn up.

- ***France***

The "Minitel" and the development of "telematics" have made it possible to gain valuable experience in the area of services provided at a distance. With a view to launching a debate on the need for a new policy, in 1994 the French Government commissioned a series of strategic reports on the various issues raised by the advent of the Information Society. The *Breton Report*, entitled "Teleservices in France", which was presented to the Prime Minister on 11 July 1994, examines more particularly the question of the development of new Information Society services and concludes that the rules and regulations need to be adapted owing to the mismatch between the current instruments and the new methods of organisation made possible by new technologies. The *Detailleur Report*, which was presented to the Prime Minister on 24 January 1995, examines the implications of the new technological environment for the press. It points out that some new situations involving the new services will uncover gaps in the law. Any adaptations should be gradual and be the result both of analysis of the experiments that are being carried out and of an ongoing study of the legal implications. The *Sirinelli Report*, entitled "Cultural industries and new technologies", examines the impact of new technologies on intellectual property law. The *Théry Report*, entitled "The Information Superhighways", which was presented to the Prime Minister on 31 July 1994, examines the strategic implications for France of the information superhighways. All these reports stress that regulatory activity will be necessary in those areas that are already identified, without, however, specifying clearly either the content or time-scale. On 26 March 1996 a Law, which came into effect immediately, was adopted by Parliament with a view to launching experimental new services.

- ***Italy***

The Senate Standing Committee approved, in February 1995, a document entitled *"in materia di multimedialità"*, which describes in detail the Italian situation in this field. The report, which analyses the French "Breton" and "Théry" reports, highlights several regulatory issues (e.g. data protection, media concentration, advertising) and asks whether adaptation of the existing laws is necessary.

- ***Luxembourg***

On 4 May 1995 the Prime Minister announced to the Chamber of Deputies the setting-up of a body to be known as the "Cabinet de l'information", within which the competent Ministries are to co-ordinate, channel and centralise initiatives. Alongside this body, there will be a "Comité d'accompagnement", consisting of representatives of the business community and of the media and the communications industry, whose task will be to make proposals and discuss ways of bringing about the Information Society. According to the Prime Minister, many issues still have to be clarified, such as data protection, the social consequences, copyright, etc. The Chamber of Deputies is to hold a wide-ranging debate. In any event, it would appear that either a new regulatory framework will be drawn up, or the existing regulatory framework will be adapted to take account of the specific character.

- ***Netherlands***

In December 1994 the Government adopted an action programme (*"Actieprogramma"*) to accelerate the introduction of the Information Society. Although the document concentrates on the infrastructure aspects, certain issues relating to the legal framework for the services were identified: for example, the protection of personal data, encrypted services, intellectual property and public policy (crime and ethics). The regulatory review will be centred, not only on telecommunications legislation, but also on the so-called "accessory" regulations governing identified areas. Particular importance will be attached to the possibility of self-regulation in the service sector, which the Government believes might accelerate practical applications. The competent Ministries have set up interdepartmental working parties to implement the action programme. The Dutch media authority ("het Commissariaat voor de Media") recently authorised the use by television companies of the opportunities afforded by the new electronic media. The authorisation covers, among other things, the interactive use of television, the publication of electronic programme guides, the distribution of programmes on the Internet, the exchange of information and direct marketing. It might also cover the supply of video-on-demand and pay-per-view services. Lastly, a steering committee, composed of representatives of several Ministries, has been set up to deal with any difficulties caused by the existing rules and to co-ordinate the introduction of the new legal framework for electronic services.

- ***Sweden***

The Government has appointed a commission to promote information technology. An initial report entitled *"Wings to Human Ability"* was submitted in August 1994. The current legal situation is considered unsatisfactory. The report finds that a stable legal framework in the areas of copyright, contract law, civil law, advertising, and the safeguarding and protection of personal data is essential to the development of information technologies. To produce a body of profitable services, particular attention should be paid, among other things, to the law of contract and intellectual property law. The aim of adjusting the rules and regulations should be attained in the course of the next three years. An official committee has been set up to examine such matters as the relationship between televised media, the new services and the law on the freedom of the press. Concrete proposals should be made during this year.

- ***Finland***

In early 1995 the Government published a report entitled "*Developing a Finnish Information Society*". Existing working parties, such as those on audiovisual law, copyright law and multimedia law, might discuss problems connected with new services. It would appear likely that Finland, which already has very liberal rules on media, will, in the field of new services, base itself also on self-regulatory bodies, with the exception of criminal acts governed by the criminal code. The general approach seems to be to regulate as little as possible.

- ***United Kingdom***

The report entitled "*Creating the Superhighways of the Future: Developing Broadband Communications in the UK*", prepared by the DTI and presented to Parliament in November 1994, has identified an overriding need to create a stable, effective and evolutive legal framework in order to increase the confidence operators must have if they are to invest, and has found that particular attention should be paid both to the protection of personal and industrial data moving on the networks and to adequate protection of intellectual property rights. The document announced the creation of a Multimedia Industry Advisory Group (MMIAG) composed of leading industrialists which is to advise the competent Minister on the opportunities for, and obstacles to, multimedia development. Subgroups are charged with examining *inter alia* questions concerning the legal framework in the identified areas and also that for medical applications. The subgroup on intellectual property issues has expressed the view that the procedures for conferring rights should be simplified for the new multimedia products, and recommends that the laws on defamation and obscenity should be amended and that, following proposals in the United States, a transmission right should be introduced to protect copyright. Another interdepartmental working party was set up within the Prime Minister's office to discuss the need for adaptation of the law in force, notably in the areas of intellectual property and data protection law. In July 1995 a bill amending the law and procedure relating to defamation was introduced (bill entitled "An Act to amend the law of defamation and to amend the law of limitation with respect to actions for defamation and malicious falsehood"). The bill includes electronic publishing in its scope (section 1). At political party level, the Labour Party presented a report in July 1995 entitled "*Labour's Policy Forum on the Information Superhighway*", which refers in particular to the areas of consumer protection, copyright, the protection of minors, public policy, piracy, data protection, marketing, and the rules of labour law and the law relating to social security as they apply to teleworking, etc., and calls for regulatory action at the domestic level.

2. New regulatory needs

In addition to specific areas, such as telecommunications, which are subject to specific regulations at Community level, an analysis of these various activities reveals that new rules, or legislative adjustments to the existing ones, will be needed often inasmuch as the latter were not designed with Information Society services as such in mind. They were meant for certain specific risks which may be attendant on existing services in relation to certain general interest objectives (e.g. the protection of public health in the case of

medical services, the protection of consumers or of pluralism in the case of television services, the protection of competition or consumers in the case of telecommunication services, etc.). Owing to their different characteristics, Information Society services will change, for better or for worse, the nature of the risk covered by the current rules. Thus, *compared with traditional professional services* necessitating movement on the part of the provider or receiver, services provided electronically at a distance may change the type of risks to which consumers are exposed. Similarly, *compared with broadcasting*, services meeting specific needs of the service receiver ("interactive" services) do not give rise to the same problems in relation to the safeguarding of the public interest. For example, unlike in the case of interactive services, the risks inherent in television broadcasting are that, (a) once a programme has been broadcast, it is not possible to know precisely who is in fact going to watch it, (b) the consumer is more passive in his response to, or a captive of, the programme (as he cannot influence its content) and (c) it is a "mass" medium. Conversely, interactive services give rise to other risks owing precisely to the level of individualisation of the special relationship between the provider and the receiver of a service (privacy, consumer protection, etc.).

To counter these various risks, regulatory changes will be needed to ensure, where appropriate, better protection or, on the contrary, to loosen the existing constraints. In some cases, one short-term solution for national authorities will be to use their power of interpretation to find solutions. These solutions might, however, be variable and open to challenge and may thus themselves trigger intervention by the legislator. Moreover, in many cases, the current rules do not leave sufficient room for manoeuvre for it to be possible to avoid the need for legislative intervention.

a. The need for new forms of protection

The current rules are attuned to serving the needs of existing service activities (e.g. professional services, telecommunication services, television broadcasting services), but will not necessarily be so in the case of the new services and might therefore need to be strengthened or supplemented.

Improving the existing protection. The rules in force pursuing a general interest objective may need to be adapted in order to ensure more effective protection of that interest against the new risks created by Information Society services. In this case, the aim will be not to pursue a new general interest objective, but to ensure better protection of an objective that is already recognised.

This better protection might be brought about by an *adaptation* of the applicable laws aimed at increasing the level of the existing protection. In view of the fact that Information Society services will consist in providing, in a different form, services which already exist and are already regulated, it is likely that numerous adaptations of these rules will be necessary. Thus, for example, bearing in mind that the services will be provided at a distance, the current rules governing professional services (health care, etc.) might not be sufficient in relation to identification and the qualifications of the service provider (difference between a consultation in a hospital and a consultation at a distance).

The improvement in protection might also consist in *extending the spectrum of the laws* applicable to a particular activity. Thus, services which were traditionally subject to a set

of clearly delimited legal rules might be made subject to sets of rules applied to other legal categories so as to ensure fuller protection. For example, in the case of audiovisual services such as video-on-demand, compliance with specific provisions on data protection might, where appropriate, be provided for (bearing in mind that interactivity makes it possible to identify the user and hence gives rise to risks as far as the protection of privacy is concerned), whereas the rules on television traditionally do not cover such risks.

Protecting new areas of public interest. Besides adapting the rules with a view to attaining more effectively the objective they pursue, it might be necessary to meet new general interest objectives. Thus, for example, the current discussions about the virtuality of the Information Society might trigger a regulatory response aimed at ensuring a degree of veracity.

b. The need to scale down existing forms of protection

Conversely, some existing rules might become unnecessary or disproportionate and will have to be rendered inapplicable to the new services or made more flexible.

Stopping the applications of rules which are misapplied. In view of the fact that the services will be at a cross-roads between different legal categories, some of them might be subject to rules which were clearly not intended to cover this type of activity. Legislative intervention will therefore be necessary in order to remove the services concerned from the scope of the rules in question. It would, for instance, be appropriate to assess whether, and if so, to what extent laws on television broadcasting are applicable to Information Society services.

Adapting disproportionate rules. Other services might be subject to certain constraints which will be out of proportion to the legitimate objective they pursue. This might involve either a type of obligation which is out of keeping with Information Society services, or measures which go further than is necessary to attain their objective. Thus, for example, while the protection of minors is, of course, a fundamental aim, it might be inappropriate (and perhaps contrary to Article 10 of the ECHR) to provide, as in the case of television broadcasting (where there can be no safeguards as to "who watches what"), for a total ban on services intended for adults.[32] To take another example, the obligation to draw up a written contract before concluding a sale is not appropriate in the case of electronic commerce. Similarly, the prior authorisation or licensing arrangements applicable to telecommunication or broadcasting services might not be suited to Information Society services (bearing in mind, in particular, that other arrangements, such as those applicable to the press, might afford more effective protection).

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32 Interactivity and the technical means by which a user will have access to the new services might increase the opportunities for parents to control access by minors to violent or pornographic programmes. The broadcasting rules on the protection of minors are therefore not necessarily appropriate, the risk of uncontrolled access by minors being much greater in the broadcasting context.

3. A wide-ranging and drawn-out regulatory adjustment

The political mobilisation in the Member States around the Information Society theme and the development of the market for services will necessarily have an impact on the scope of regulatory activity at national level.

(a) *A broad spectrum of rules and regulations*

Owing to the wide variety of services involved, a multitude of legal fields will be affected, in particular *the law governing the press* (should, for example, the specific arrangements governing the press, such as the principle of editorial responsibility, be applicable?), *the law governing telecommunications, civil law*,[33] in particular the law of contract,[34] the *law governing audiovisual services*[35] (for example, must there be a prior authorisation system, or should the traditional rules on pluralism apply?), *labour law and the law relating to social security*[36] (for example, what arrangements should apply to teleworking?), *tax law*[37] (for example, which new services might qualify for tax incentives?), *criminal law*[38] (for example, what arrangements and procedures should be laid down for offences?), *banking and financial law* (for example, what arrangements should apply to distance banking, insurance or stock exchange services?),[39] the *law on commercial communication*[40] and, lastly, the *rules governing the professions* (for example, what arrangements should apply to the provision at a distance of legal or medical services?).

These provisions will pursue a variety of general interest objectives: *freedom of expression*, the *protection of privacy* (all services), the *protection of minors*, the *protection of the consumer* (for example, electronic sales service), the *protection of intellectual property*, the *protection of health* (for example, telemedicine services), the *protection of culture or language* (for example, teaching service), etc.

Certain specific questions have already been identified, in numerous governmental studies and reports, as being the first that will have to be dealt with, such as those of *data protection*, the *protection of intellectual property* and *the protection of consumers* and *of minors*, and the protection of, and arrangements applicable to, the *encryption* of services.

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33 See the Swedish report entitled "Wings to Human Ability".

34 The question is already being examined by notaries in some Member States. See Revue de l'Assemblée de Liaison des Notaires de France n° 6, 1995, and Bundesnotarkammer, Elektronischer Rechtsverkehr, Cologne 1995.

35 See the Prognos study; the Detailleur Report; "the Waterloo Report"; the Coudert Brothers report; the study entitled "Information Society: Access and Pluralism", International Federation of Journalists, March 1995.

36 See in this connection the study by Thierry Breton entitled "Le télé-travail en France: Situation actuelle, perspectives de développement et aspects juridiques".

37 Thierry Breton "Le télé-travail en France: Situation actuelle, perspectives de développement et aspects juridiques"; Thierry Breton: "Les télé-services en France. Quels marchés pour les autoroutes de l'information?"; Jean-Marc Detailleur: "Evolution de la presse écrite dans la perspective des nouvelles technologies multimédias".

38 See *inter alia* the Dutch Government's report: Actieprogramma Electronische Snelwegen "van metafoor naar actie".

39 See reports by Thierry Breton "Les télé-services en France" and Gérard Théry "Les autoroutes de l'information".

40 See Prognos study, Détailleur Report, and the Coudert Brothers report.

(b) A vague and very drawn-out timetable

Analysis of the market for services has shown that there will be no "big bang" and that the services will develop gradually. Accordingly, the regulatory response will also be staggered so as to keep pace with the development of the market and deal with the various questions as and when they arise. The national regulatory framework for Information Society services will therefore be evolutive in nature.

No precise timetable has been set. As a rule, the studies and reports confirm that thinking in the vast majority of Member States - apart from Germany - is not yet focused on specifics, and stress that it is difficult to fix a timetable for adapting laws. Some reports provide pointers only to the making of the first specific regulatory adjustments.[41] Thus, the Netherlands wishes to review its legislation on data-related offences before the end of 1996, and Sweden wishes to adjust its legislation within the next three years. Moreover, economic analyses reveal that new services which cannot yet be imagined might, in future, arrive on the market as technological progress is mastered and the market develops. It is all the more difficult to imagine today what the regulatory needs will be for such services.

There is much uncertainty about the content of the rules and regulations which might be necessary in the future. National and international experts have identified the relevant areas, but often do not make proposals for the necessary course of action that should be followed and the specific provisions that should be laid down. In view of the societal and political issues at stake as revealed by the intensity of the political mobilisation, and leaving aside cases where rules and regulations are adopted as a matter of urgency in response to a given situation, regulatory solutions will be particularly complex to work out and in some cases may spark a lengthy debate which might continue into the next millennium.

Recourse to pilot projects is one method of regulatory intervention which is especially popular in France and Germany.[42] It consists in intervening initially solely with a view to establishing interim or ad hoc exceptional arrangements intended to permit the development of pilot projects involving Information Society services. The follow-up to, and analysis of the experience gained from, these pilot projects will enable the legislator to have a better overall view and, subsequently, to regulate fully these new services. Thus, the actual regulations would come into being only after a fairly long period,[43] depending on the time it takes to draw reliable conclusions from the pilot projects. This pragmatic "exception/pilot project/monitoring/new rules" method could become one of several short-term regulatory approaches making it possible not to legislate prematurely while remaining in a posture of regulatory readiness whereby any action may be taken advisedly.

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41 See *inter alia* the Swedish report "Wings to Human Ability", the Dutch report "Actieprogramma Electronische Snelwegen" and "The Danish Government Report on the Information Society Year 2000".

42 A bill is being drafted with a view to introducing exceptional arrangements lasting five years aimed at enabling 170 pilot projects to be carried out.

43 A period of five years is envisaged in France.

Lastly, the scenario of a permanent or continuous regulatory adjustment is also possible given the potential versatility of technological developments and societal values.[44]

B. The risks to the functioning of the Internal Market

The regulatory activity for which the ground is being prepared in the Member States might, if it is not monitored, jeopardise attainment of the Internal Market objective.

1. Risk of refragmentation of the Internal Market

If nothing is done to co-ordinate the formulation of the new national rules and regulations applicable to Information Society services, there is a strong likelihood that those rules and regulations will be different, if not divergent, from one another. Such a state of affairs would lead to new restrictions on the free movement of Information Society services between Member States since one Member State could limit or prohibit the provision of a service originating in another Member State by making it subject to its own national rules and regulations. In the light of the law governing the Internal Market, and in particular Article 59, some of these measures might not be justified whereas others would be. In the former case, the Commission would have to intervene to induce the Member State to abolish the legal barrier thus raised, while in the latter it would have to propose, if necessary, harmonisation of the laws in question in order to safeguard freedom of movement. Until the effects of this action made themselves felt, in either case the European Information Society services industry would be unable to benefit from a genuine area without internal frontiers and might be dissuaded from undertaking the investment which is essential to its competitiveness. A number of reasons militate in favour of this negative scenario.

Reasons relating to the development of the market. Analysis of the market for new services shows that its development will be gradual and of a variable-geometry nature, that is to say different from one Member State to another. This means that the regulatory reactions will be forthcoming at different times depending on the Member States and will be directed towards different services. Thus, for example, a particular Member State in which the professional services of telemedicine are destined to develop rapidly might therefore regulate such services, whereas at the same time another Member State could regulate electronic commerce and distance betting services owing to the scale of an operator's activities on the domestic market.

Reasons relating to national traditions and culture. National laws are expressive of a whole set of economic, cultural, social and political values and traditions which vary from one Member State to another. Experience shows that the regulatory approach, in any field, is based on these different concerns and may even lead to regulatory reflexes. This means, first, that those issues which are prime candidates for regulation will vary from one Member State to another (for example, some Member States might place the emphasis on safeguarding national culture, others on consumer protection, and others still on the protection of minors and the upholding of moral standards) and, secondly, that on one and the same specific issue the content of the rules and regulations will also vary (for example, national approaches to the protection of minors, data and consumers already

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44 See, for example, Prognos study, pp. 143 *et seq.*

differ considerably, reflecting the diversity of sensitivities, perceptions and objectives peculiar to each country).

Reasons relating to the original legal arrangements. The national legal arrangements that will have to be adapted already differ from one Member State to another. Consequently, the adaptations will pursue their own intervention logic, and this might amplify the current disparities. Thus, for example, the German-law concept of "broadcasting" (which permits the sharing of competencies between the *Länder* and the Federal Government), or the French system of *a posteriori* control developed for Minitel services, or the modulated and simplified British system already applicable to satellite television broadcasting organisations provide many different points of departure for laying down rules governing access to the new service activities (*a priori* control or *a posteriori* control). The different approaches that currently exist in the intellectual property field or the arrangements applicable to encryption systems (some Member States provide for prior authorisation, while others do not) also serve to illustrate this point.

Reasons relating to the polymorphism of Information Society services. In view of the fact that these services will be highly diverse, the spectrum of legal fields concerned will also be very wide. The risk of divergent regulatory approaches is therefore all the greater and will result, at the level of the functioning of the area without internal frontiers, in an increase in the number of potential obstacles to the free movement of services. This gives particular cause for concern because service providers will generally provide a package, or bouquet, of several services, as a result of which there is also an increased risk of their encountering new legal barriers. Thus, a service provider who provides a bouquet of services consisting of interactive games, teleteaching, video-on-demand and teleshopping might have one of his services restricted in one Member State, while in another Member State it is another service that is restricted. The number of possible combinations of situations of this type has obvious implications for the increased potential for raising barriers.

Initial signs of divergent approaches confirm the magnitude of this risk. A study of the work in hand reveals, for example, that there are differences in the thinking on, and approaches to, the question of whether a system of prior authorisation is necessary or whether, on the contrary, a system closely resembling that applicable to the press is needed. To give another example, the regulatory issues that have been identified as being important are not always the same (matters such as labour law, the protection of minors and the rules on liability are not always mentioned in the individual studies and reports).

2. Risk of overregulation

The political mobilisation and the mobilisation of interested parties around the Information Society theme could result at national level in new rules and regulations which will themselves result in Community regulatoryactions despite the fact that the need for such actions has not always been established.

Internal Market legislation is necessary only where national measures have restrictive effects on the freedoms enshrined in the Treaty which cannot be resolved by direct application of the Treaty or by the existing secondary legislation. Evaluating these restrictive effects can be a complex task given that in many cases it will be necessary to

assess whether the national measures creating such restrictions are proportional to the general interest objective they pursue. It is worrying that, when faced with national regulations giving rise to this type of problem, some interest groups might prefer to extend them to the whole Community via harmonisation rather than carry out such an evaluation exercise enabling these new barriers to be removed by applying directly the Treaty.

This would be tantamount to encouraging *faits accomplis* aimed at provoking a Community response. The risk of overregulation must not be underestimated given that pressure is already clearly being exerted by certain interested parties, operators, trade associations, consumer associations, etc.[45]

The Commission considers there should be no excessive regulation at Community level simply with a view to complying with vociferous requests for intervention, but that instead reliance must be placed on the well-tested principles of the Internal Market, notably that of mutual recognition.

3. Risks of inconsistency

The regulatory activity at national level that will take place in the years ahead might be reflected at Community level not only in overregulation but also in measures which are mutually inconsistent. The diversity of general interest objectives which will be pursued at national level (protection of the consumer, culture, health, etc.) might, as is permitted by the Treaty on European Union, be extended at Community level by measures pursuing each of these objectives in isolation, without any overall consistency.

The Commission considers that all national measures should respect the regulatory consistency that is essential to the future development of these services and take full account of all general interest objectives. Inasmuch as the purpose of Internal Market secondary legislation is to ensure an equivalent level of protection between Member States of a variety of general interest objectives, the Commission has already decided that any regulatory response to the new services will have to fit into the tried and tested framework of the Internal Market.

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45 A number of operators' representatives outlined their position at the G7 summit in Brussels on 24-26 February 1995. Following the manufacturers' European round table, a document was drawn up entitled "Building a global Information Society - A call for Government Action", May 1995, calling for adaptation of national and international rules in the areas of data protection, intellectual property law, civil law and criminal law with a view to affording better protection against piracy (encrypted services), the rules on liability, etc. The same areas were identified by representatives of the audiovisual industry, cable operators and telecommunications companies at a seminar held in Belgium from 19 to 21 May 1995 (The Waterloo Report on "Transatlantic Dialogue on Broadcasting and the Information Society"); three recent resolutions of the International Communications Round Table (ICRT) also stressed certain regulatory requirements.

III. DESCRIPTION OF THE TRANSPARENCY MECHANISM

The Commission proposes to establish a regulatory transparency mechanism based on Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations.[46] To this end, the Commission is presenting a proposal for a Council Directive amending Directive 83/189/EEC for the third time by extending the information exchange procedures provided for therein to include future draft rules and regulations of the Member States on Information Society services.

A. Objectives

The general objective of the transparency mechanism proposed by the Commission is to enable the Internal Market to function more smoothly in the Information Society services field. The mechanism pursues more specifically the following objectives:

1• ***Ensuring the smooth functioning of the Internal Market by avoiding the creation of new obstacles***

The exchange of information between Member States and between Member States and the Commission is intended to make it possible to detect in good time any difficulties in the functioning of the area without internal frontiers and to take action to prevent either the adoption of national regulations which might be incompatible with the principles of the freedom to provide services and the freedom of establishment (contacts with the other Member States or the Commission having dissuaded the Member State concerned from adopting the draft or having induced it to amend it), or the creation of legal barriers (where such regulations are justified under Community law) by proposing, where appropriate, Community rules. It is in no way the Commission's intention to limit the power to legislate at national level in order to protect the general interest, but only to prevent refragmentation of the Internal Market.

2• ***Ensuring more effective protection of the general interest***

The need for Community action to ensure that the general interest is protected in an equivalent manner in all Member States must be anticipated and identified in good time. Domestic concerns which may induce a Member State to seek to legislate may be shared by other Member States and may be more effectively met by protection at Community level. This latter aspect is essential in the Information Society context given that the technological environment will increase (a) the opportunities for circumventing protection provided for solely at the level of a single Member State; (b) the problems linked to determination of the law applicable to service providers or to the services themselves; (c) the identification of guilty parties; and (d) the difficulties connected with effective application of the rules or with crime prevention, etc.

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46 Council Directive of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 109, 26.4.1983, p. 8), as amended by Directive 88/182/EEC of 22 March 1988 (OJ L 81, 26.3.1988) and by Directive 94/10/EC of 23 March 1994 (OJ L 100, 19.4.1994).

3• ***Targeting more accurately and reducing the need for new Community rules***

In order to limit the need for legislating at Community level to that which is strictly necessary, it is essential that the Treaty, and in particular Articles 52 and 59 thereof, be applied more effectively. A transparency mechanism would make a valuable contribution here by making it possible, *upstream*, to forestall or limit the adoption of certain national laws which might subsequently lead to Community regulations aimed at validating them. Above all, the national legislator must consider the possibility of applying mutual recognition instead of allowing *fait accompli* situations to develop which might lead to harmonisation being proposed at Community level. In any event, since it represents an information gathering procedure which does not prejudice the basic evaluation of the possible need for future Community harmonising measures, the transparency mechanism, wherever it is necessary to ensure effective protection of a general interest objective through intervention at Community level, will contribute to the possibility of a more rapid and well informed introduction of a new harmonisation measure.

4• ***Facilitating administrative co-operation***

A mechanism for the exchange of information between Member States at the stage of the drafting of rules and regulations should encourage the national legislator to ask other national administrations about the situation in the other Member States. The aim is not to challenge the power of Member States to legislate, but to create an awareness of the potential danger both to the Internal Market and to the effective protection of general interest objectives stemming from isolated legislative initiatives which ignore both experience gained elsewhere and the impact on service providers established in other countries. The transparency mechanism is a particularly effective tool of administrative co-operation which may lead to a genuine, collective European reflex.

5• ***Contributing to the stability of the regulatory framework***

The existence of a clear, stable legal framework has been identified as a precondition for stimulating the development of the Information Society. The aim of a transparency mechanism is precisely to contribute to the stability and accessibility of the regulatory framework, first of all by limiting the risk of unforeseeable regulatory reactions, secondly by avoiding periods of uncertainty during infringement proceedings, and thirdly by enabling operators and consumers to have more information about any draft rules and regulations that might affect them.

6• ***Improving the Community's participation in discussions at the international level***

The definition of a stable, coherent Community law framework is a basic precondition for effective, co-ordinated participation by the European Community in work on regulatory issues relating to Information Society services in the context of international co-operation and negotiations.

B. General approach

1. Experience gained with existing transparency mechanisms

The idea of ensuring the smooth functioning of the area without internal frontiers with the help of a regulatory transparency mechanism is far from new. Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations is the most comprehensive instrument to date on regulatory transparency. The Directive, which has already been amended twice, notably to widen its scope,[47] has become a key instrument of Internal Market policy. There are other transparency mechanisms based on Directive 83/189/EEC. They differ from it, however, either in that they are directed, not at draft rules and regulations, but national measures which may continue to exist despite the fact that they form an obstacle to the free movement of goods (European Parliament and Council Decision establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community[48]), or in that transparency is only a secondary aspect compared with the general aims pursued by the instruments in question.[49]

(a) Functioning of Directive 83/189/EEC

The Directive ensures that information is exchanged between Member States in the field of technical regulations and standards. Member States are required to inform the Commission[50] and the other Member States of any draft national technical regulations[51] they propose to adopt. A three-month standstill period is provided for to enable the Commission and the other Member States to examine the draft measures and make their reaction known.

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47 Council Directive 88/182/EEC of 22 March 1988 (OJ L 81, 26.3.1988) and Council Directive 94/10/EEC of 23 March 1994 (OJ L 100, 19.4.1994).

48 OJ C 18, 21.1.1994, p. 13. The Council adopted a common position on 29 June 1995 (OJ C 216, 21.8.1995, p. 41). The Decision provides for the provision of information to the Commission within 45 days of the date on which the measure was taken; the Commission forwards the information to the other Member States.

49 cf. Directive 87/22/EEC of 22 December 1986 (Article 5) on the approximation of national measures relating to the placing on the market of high-technology medicinal products, particularly those derived from biotechnology (OJ L 15, 17.1.1987, p. 38); Directive 93/98/EEC of 29 October 1993 (Article 12) harmonizing the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9); Directive 94/62/EEC of 20 December 1994 (Article 16) on packaging and packaging waste (OJ L 365, 31.12.1994, p. 10). Whereas Directive 87/22/EEC refers expressly to those articles of Directive 83/189/EEC which provide that the notification is to have suspensive effect, the other two do not provide for such an effect, requiring only that draft regulations be notified.

50 Under Article 8(1), Member States must communicate to the Commission any draft technical regulation at a stage in its preparation at which substantial amendments can still be made. The Commission circulates the information among the Member States in order to make them aware of national initiatives.

51 Technical regulation is defined as a technical specification or other requirement the observance of which is made compulsory *de jure* or *de facto*, by a Member State in the case of the marketing or use of a product in its territory (Article 1). The category of *de facto* compulsory technical regulations includes voluntary agreements to which the public authorities are party and professional codes of conduct, compliance with which confers a presumption of conformity with the requirements laid down by certain rules and regulations.

Four scenarios are then possible:

1 - *No comments* from the Member States and/or the Commission. In that event, the Member State concerned may adopt the draft rule upon the expiry of the three-month standstill period.

2- *Comments*, by the Commission or a Member State, about the possible consequences for the Internal Market of the proposed measures were they to be adopted and applied to goods from other Member States, and requests for amendment.[52] The Member State concerned is required to take the comments into account as far as possible when it draws up the definitive version. Such comments often result in a mutual recognition clause which is inserted in the draft law.

3- *Detailed opinion* issued by the Commission or by a Member State where they consider that, were it to be applied to goods from other Member States, the measure would contravene the Community rules on the free movement of goods.[53] The issuing of a detailed opinion extends the length of the standstill period to six months (or four months in the case of voluntary agreements). The purpose of this period is to allow the matter to be re-examined and to prevent an infringement of Community law from occurring.

4- *Declaration that the Commission is going to propose,*[54] *or has proposed,*[55] Community measures in the area in question. The announcement extends the standstill period to 12 months, or to 18 months if the Council adopts, before the end of the period, a common position on the proposal. The extension of the standstill period is to enable the Community to examine the matter without the discussion being distorted or made more complicated by earlier measures. It is not, however, possible in the case of voluntary agreements.

If a Member State wishes to adopt a technical rule for urgent reasons relating to the protection of public health or safety, the protection of animals or the preservation of plants, it may be authorised to do so without having to observe the standstill period.[56]

An Advisory Committee[57] consisting of Member States' representatives meets approximately six times a year and plays an important part in supervising the conduct of the procedure and examining political issues raised by notifications.

A vade-mecum, adopted by the Committee, explains the operational aspects and, at length, the procedures to be followed (categories of information, details and content of the notification, etc.).[58]

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52 The Member States and/or the Commission may make comments pursuant to Article 8(2) of the Directive. At the request of the other Member States or of the Commission, the definitive text of the technical regulation must be communicated to them.

53 Article 9(2) of the Directive. The detailed opinion of the Commission is a formal act which is equivalent to service of notice if the draft is adopted as it stands.

54 Article 9(3).

55 Article 9(4).

56 Article 9(7).

57 Article 6.

With regard to the instrument's legal scope, the Commission has taken into account that a finding that a Member State has failed to fulfil its obligation to comply with the notification procedure introduced by Directive 83/189/EEC may well remain a dead letter as long as the national measure remains in force. It accordingly stated in a communication dated 1 October 1986 that unnotified technical rules cannot have legal effect against third parties.[59]

(b) Application and evaluation

In the light of the latest statistics, Directive 83/189/EEC has clearly confirmed its reputation as a key procedural instrument that is both highly incisive and effective in terms of the results achieved. In 1992, 1993 and 1994 the Commission processed 1 136 draft national technical rules, across all sectors. It delivered 355 detailed opinions in respect of Member States, made 532 comments and made 62 declarations with a view to furthering harmonisation at Community level. Member States' reactions to notified drafts in the form of detailed opinions (226) or comments (473) are increasingly numerous, and this enhances, in a spirit of great transparency, their participation in the notification procedure.

With regard to the Member States, the examination of drafts by the Commission and other Member States has played a dissuasive role and awakened among them an awareness of their European responsibilities. The Commission is grateful for the co-operative attitude shown by Member States, prepared as they are to modify, where necessary, their instruments when they are still in draft form so as to insert, notably, a mutual recognition clause.

With regard to operators, this transparency is beneficial inasmuch as they are able to intervene indirectly when Member States solicit their views on the various national legislative proposals with which they will be confronted in the Internal Market. The cessation of the obligation of confidentiality, an amendment introduced by Directive 94/10/EC, enables economic operators who are concerned mainly about technical obstacles to defend their interests better during the notification procedure rather than belatedly through a complaint. The part played by operators is worth emphasising as the mechanism may constitute not only an instrument of administrative co-operation but also an instrument of co-operation between the authorities and interested parties, thereby helping to improve the quality of regulations.

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58 The Directive also lays down (Articles 2-7), with regard to technical standards, a procedure for the exchange of information between national and European standards bodies and the Commission. The procedure's implementation has been entrusted by the Commission to the European standardisation organisations.

59 Commission communication on the non-respect of certain provisions of the Council Directive (83/189/EEC) of 28 March 1983, providing for an information procedure in the field of technical standards and regulations, OJ C 245, 1.10.1986, p. 4. The Court of Justice has so far imposed penalties on Member States for failing to notify such provisions on four occasions.

2. The proposed transparency mechanism

In order that it might be able to satisfy the needs that have been identified and attain the objectives that have been defined, the transparency mechanism applicable to rules and regulations on Information Society services should, in the Commission's opinion, possess the following four features:

(a) A binding legal instrument

The Commission is convinced that, in order to ensure effective regulatory transparency, the Community must have a legally binding instrument at its disposal. No other initiative can meet the requirements and objectives. If it were left to the discretion of the Member States to communicate their draft regulations on Information Society services, this would limit considerably the scope and effectiveness of the transparency and would detract from the spirit of administrative co-operation.

(b) A prior information procedure

Only a system of prior notification can forestall and prevent in good time the creation of obstacles to the Internal Market freedoms. *Ex post facto* notification, that is to say, notification after the national rules have been adopted, would suffer from several drawbacks:

- it would simply amount to noting the existence of new legal barriers between Member States which can be removed only by resorting to lengthy procedures (action under Article 169 of the Treaty for failure to fulfil an obligation) or by harmonising the rules in question. In either case, the result would be that operators and consumers would have to bear, in the meantime, the costs arising from the lack of a genuine Internal Market;

- it would encourage *faits accomplis*, that is to say, cases in which the adoption of a national rule has the effect of forcing the Community to act;

- it could not stimulate a European administrative co-operation reflex since it would be in essence a purely formal procedure (transmitting a text) rather than an attempt to evaluate together the Community impact of legislation. In any event, once such legislation had been adopted, the authorities' room for manoeuvre would be very limited.

Consequently, the Commission proposes that the same approach as that established by Directive 83/189/EEC should be adopted: Member States should communicate to the Commission any draft rule or regulation which will be applicable to Information Society services at a stage in its preparation at which substantial amendments can still be made. This obligation to notify will cover voluntary agreements to which the public authorities are party and professional codes or codes of conduct compliance with which confers a presumption of conformity with the requirements laid down by certain rules and

regulations.[60] *The Commission will circulate this information among all the other Member States in order that they might take note of national initiatives.*

(c) A consultation procedure

A mere obligation to transmit drafts without any subsequent procedure would be ineffective:

- it would provide no guarantee that the national authority concerned would take account of any comments made by the Commission or other Member States and prevent the creation of obstacles to the freedoms enshrined in the Treaty. The sole means of guaranteeing these freedoms is to specify a period during which the Member State may not adopt the draft regulation. During this period, the administrative co-operation may function fully, the Member States and the Commission being able to assess the draft in question and propose, where appropriate, that the measure envisaged be amended with a view to removing or reducing the barriers to free movement;

- it would reduce the chances of speedily adopting a harmonisation proposal aimed at protecting the general interest at Community level (where this is necessary), since the Member State concerned might prefer to adopt its legislation and thus perhaps challenge the need for, or the thrust of, the work at Community level. Only a standstill period during which the adoption of the draft is not possible would not compromise any Community initiatives.

Consequently, the Commission proposes, here too, to apply the procedures provided for in Directive 83/189/EEC: following notification of the draft regulation, an initial standstill period of three months starts to run during which Member States and the Commission may intervene to make comments, deliver a detailed opinion (total standstill extended to six months or four months in the case of voluntary agreements) or, in the case of the Commission, declare that a future harmonisation proposal will be presented or that it has already proposed harmonisation measures (total standstill extended to 12 months, or 18 months if a common position has been reached).

(d) A committee

A committee should make it possible to administer the procedure effectively. As already indicated, one of the main objectives of the transparency mechanism is to stimulate a dialogue between the legislators of the various Member States and to promote administrative co-operation. Administrative co-operation between Member States is all the more justified as Information Society services are prone to rapid and unforeseeable development. The creation of a forum intended for the exchange of experience can only enrich and improve the contemplated regulations and increase awareness among national administrations that their draft legislation might harm the proper functioning of the area without internal frontiers. In the short term, the Committee might, for example, examine certain questions concerning problems of interpreting the current rules in the light,

[60] The Commission considers that, provided a link with the State can be established, professional codes must be communicated. Thus, draft amendments to professional codes should be notified where the regulatory power of the professional body is based on a legislative provision.

among other things, of the dialogue that should exist between the authorities and the parties concerned.

The Committee provided for in Directive 83/189/EEC can play this role and may therefore serve as a model for the regulatory transparency mechanism.

C. Legal instrument

The Commission proposes widening the scope of Directive 83/189/EEC. This method has the following advantages:

- the Directive meets the precise requirements and has the same objectives as those pursued within the framework of the Information Society (preventing refragmentation, protecting the general interest better at Community level, avoiding overregulation and inconsistent regulations, ensuring administrative co-operation), and is the most comprehensive instrument in the area of regulatory transparency. By contrast, the other transparency instruments have been presented in the form of an autonomous measure[61] because they meet different needs and provide for obligations different from those of Directive 83/189/EEC;

- it makes it possible to draw on the experience and know-how gained from implementing Directive 83/189/EEC over a period of several years, in particular: the Commission's implementation policy, the case-law of the Court, the administrative machinery that has been in place at Member State level for a number of years now for the purpose of administering the Directive's application, the existing Committee, the structure, set up by the Commission, for monitoring proper compliance by Member States with the obligation to notify and the vade-mecum explaining the practical procedures to be followed by Commission departments and Member States' administrations;

- it prevents the need for two different instruments, one for draft rules on goods and the other for draft rules on services. Two separate instruments would complicate the task of national authorities when it comes to implementing the mechanism, thereby running counter both to the aim of ensuring legal clarity and to the very objective of transparency. The lack of correspondence between the obligations laid down in the two instruments would lead, above all, to inconsistent legal situations in the case of regulations governing both services and products. This scenario could be fairly common given that, as economic analysis has shown, services activities are going to be linked to those of distributing goods;

- lastly, it is a repeat of a method that has been used successfully twice: the first amendment to the Directive consisted in extending the concept of technical specification to cover all industrial products not yet included in the original scope of the Directive, that is to say, medicinal products, cosmetics, and all agricultural products.[62] The second amendment broadened the concept by including production

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61 Either by forming only part of a Directive, or by constituting a separate instrument (proposal for a Decision establishing a procedure for the exchange of information).

62 Directive 88/182/EC, OJ L 81, 16.3.1988, p. 75.

methods and processes relating to industrial products and the concept of "other requirements" imposed on a product (Article 1(2) and (3)).[63]

D. Scope

1. Regulations concerning services that must be notified

Since this is an instrument intended to ensure the smooth functioning of the Internal Market, all draft rules and regulations which may create obstacles to the free movement, between Member States, of Information Society services and to the freedom of establishment of service providers should, in principle, be notified. The practical application of the instrument calls, however, for the clearest possible indication of the rules and regulations to be notified in order, first, that national authorities might readily determine which drafts have to be communicated and, secondly, that the Member States and the Commission are not overburdened by unnecessary notifications. There are several possible ways of achieving this:

- The method consisting in defining precisely what "Information Society services" are would be inappropriate:

  (i) first, a detailed and specific definition would be particularly difficult in view of those services' diversity, polymorphous nature and complex architecture, incorporating, as they do, features from telecommunication services, audiovisual services, traditional services and the press;

  (ii) secondly, such a definition would be artificial and lacking in clarity, and would add to the current terminological confusion surrounding "multimedia" services "on-line" services, "telematic" services, "audiovisual" services, "broadcasting" services,[64] etc. Depending on the Member State, different terms may be used to refer to the same type of service.

- An alternative method consisting in drawing up a list of services (electronic commerce, telemedicine, teleteaching, etc.) and requesting notification of those draft regulations which might affect them is not a satisfactory solution either. The two main drawbacks of such a list would be, first, that it could not be exhaustive, market analysis having shown that a precise picture cannot yet be formed of a large number of services that will be developed in future, and secondly, that it would call for clear, unambiguous definitions of each of these categories - a particularly complex task.

- The Commission considers that the point at issue here is not the terminological question of what Information Society services are (or are not). What needs to be done is, rather, to find, for the purposes of the Internal Market and of the transparency mechanism, criteria which make it possible to determine which draft regulations will have to be notified. The key element is the need to cover those draft rules which will form part of the regulatory adaptation exercise that is going to take place while the Information Society develops. This means that those regulations which have stabilised, that is, those which are *prima facie* unlikely to evolve

63 Directive 94/10/EC, OJ L 100, 19.4.1994.

64 Cf. Directive 89/522/EEC of 3 October 1989.

substantially, should not be covered. In this respect, the factors which will necessitate new regulations over and above the existing ones on traditional services (doctors, lawyers, schools, etc.) are that the services will be *provided at a distance by electronic means*; compared with current regulations on television broadcasting, the key factor is that they will be interactive, in other words they will *meet one or more individual requests from a particular service receiver*. The interactivity lies in this particular link between the service receiver and the service provider, each one being able to intervene and influence the content of the service, the consumer all the more so as he can choose it and control its content.

In the light of these criteria, the Commission proposes that only *draft rules on the taking-up and pursuit of service activities, where the services are provided at a distance, by electronic means and on the individual request of a service receiver* should in principle be notified.

This "service" defintion would cover, for examlpe:

- On-line professioanl services (solicitors services, psychologists, stock-brokers, on-line health services, etc.)

- interactive entertainment services (video on demand, on-line video-games, virtual vists to museums, etc.)

- on-line infromation services (electronic library, on-line meteorological services, on-line financial information services etc.)

- virtual shopping malls

- on-line electronic newspapers

- on-line tourism services

- on-line estate agents

- on-line insurance services

- on-line educational services

On the other hand, this defintion would not cover (because they are either not offered at a distance, or not offered via electronic means, or not supplied on individual demand):

- television broadcasting services (including near video on demand services)

- radio broadcasting services

- teletext

- non-electronic direct marketing services (for example, mail order catalogues)

- automatic bank tellers

- electronic games such as found in amusement arcades

- Voice telephony services (including via GSM)

As regards which draft rules should be notified, mention should first be made of those regulatory measures specifically and primarily aimed at new services laying down conditions as to their content (advertising, protection of minors, etc.) or relating to the service provider (solvency, worthiness,transparency in identifying the operator, ownership, etc.), those on the authorisation arrangements for new services, and those on the conditions to undertake the service activities (intellectual property, encryption, etc.).

Moreover, provisions seeking to adapt a general regulation already in force to account for new services would also have to be notfied. Such an example would be the recent pre-draft German law concerning the regulatory framework for information and telecommunications services: it foresees extending existing general legislation protecting participants in distance education services, price indications, personal data protection, protection of minors etc to new services.

Likewise, provisions aimed specifically at Information Society services included in new regulations seeking to achieve more general objectives will also have to be notified (together with all the other provisions of these regulations in order to assess their scope).

On the other hand, draft horizontal legal rules (such as those of general company law), or a rule setting out the general conditions required to enter a profession (such as, for example, requirement of a diploma, general worthiness conditions, solvency, etc.) not specifically aimed at Information Society services cannot be deemed, even indirectly, to contain rules "on new services" of the Information Society as such and will accordingly not have to be notified.

The Court of Justice held in its judgement of 30 April 1996 (in Case C-194/94) concerning Directive 83/189 that a national rule which merely serves as a basis for enabling the adoption of successive legal instruments (containing binding rules), without having legal effects of its own, would not be subject to the obligation of prior notification.

For the purpose of delimiting the extent of the prior notification obligation, it is also necessary to consider the various exceptions already provided for in Directive 83/189.

2. Exceptions

The exceptions already provided for in Directive 83/189/EEC will also apply to the draft rules and regulations. The following will thus not have to be communicated:

- Member States' laws, regulations and administrative provisions and voluntary agreements by means of which Member States comply with binding Community instruments or fulfil commitments arising out of international agreements which result in the adoption of common technical specifications. More particularly, this

means in essence that draft national laws implementing a Community Directive which, through its content, may affect Information Society services (e.g. the Directive on the protection of personal data, the Directive on distance selling, the revised Directive on television without frontiers or the future Directive on a common framework for general authorisations and individual licences for telecommunications services) are not subject to the transparency mechanism;

- provisions by which Member States make use of safeguard clauses provided for in binding Community instruments;

- provisions implementing a judgement of the Court of Justice;

- provisions the communication of which in draft form is provided for by other Community instruments (e.g. Article 12 of Directive 93/98/EC harmonising the term of protection of copyright and certain related rights[65]). Member States must, however, formally indicate that such communication is also valid for purposes of the transparency mechanism.

There are also a number of exceptions to the standstill periods: these do not apply to fiscal or financial measures, and the 12-month standstill period (which may be extended to 18 months in the case of a common position) is not applicable to voluntary agreements.

E. Legal basis

Recourse to one of the legal bases on which the Internal Market rests is the logical and consistent solution. The purpose of the proposed legal instrument is, given its aim and content, manifestly to ensure the smooth functioning of the Internal Market. This is clear from the *objectives* set out above.[66] The *contents* of the mechanism itself, that is to say the notification procedure, the holding of consultations with the other Member States, the standstill periods and the emergency procedure, are the appropriate legal solutions whereby the above objectives may be effectively attained.

Moreover, Directive 83/189/EEC (and the Directives amending it) is itself based on the Internal Market, and the present proposal for a Directive in no way alters the object and purpose of that Directive (since it consists solely in broadening the scope so as to prevent the creation of new obstacles to the Internal Market).

When choosing among the possible legal bases of the Internal Market, Articles 100a and 213 are considered to be the most appropriate bases for the proposal for a Council Directive amending Directive 83/189/EEC. The reasons for this are as follows:

- Directive 83/189 is itself based on Articles 100a and 213 (apart from Article 43); a need for consistency justifies recourse to the same legal basis for the Directive's extension;

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65 OJ L 290, 24.11.1993, p. 9.

66 Part III.A.

- admittedly, Article 100a can be considered as a legal basis only in the alternative, that is to say, only if the Treaty does not provide otherwise. In this respect, being an instrument aimed at preventing the introduction of new restrictions to the free movement of services and the freedom of establishment of service providers, Article 57(2), to which Article 66 refers for the part concerning services, might constitute a specific legal basis. However, a Directive based on Article 57(2) must seek to *co-ordinate* provisions laid down by law, regulation or administrative action in Member States; the Directive which is being proposed, however, seeks only to lay down a notification procedure without introducing any substantive legal provisions.

F. Subsidiarity

This proposal for a Council Directive amending for the third time Directive 83/189/EEC is perfectly in keeping with the spirit of subsidiarity:

- the transparency mechanism will permit a better application of Article 59 of the Treaty and of the principle of mutual recognition which stems therefrom, and this will have the effect of limiting the need for new Community regulations to that which is strictly necessary, and hence limiting also the risk of overregulation. From this point of view, the transparency mechanism is the instrument of choice when it comes to meeting the concern for subsidiarity;

- action at national level could under no circumstances attain the Internal Market objectives pursued by this proposal and, *a fortiori*, achieve them effectively. Effective co-ordination of the new national rules can be ensured only at Community level;

- the mechanism will contribute to a better application of the subsidiarity principle since it will enable both the Member States and the Commission to identify together possible barriers to the free movement of services and to detect the need for any Community action.

With regard to the principle of subsidiarity set out in the second paragraph of Article 3b of the Treaty, the subsidiarity test may be summed up as follows:

What are the objectives of the proposed action in relation to the obligations imposed on the Community?

The objective is to make a practical reality of the fundamental freedoms of the Internal Market as defined in Article 7a of the Treaty, that is, to ensure the free movement of services and the freedom of establishment, while preventing the rules that will be adopted, in future at national level with a view to regulating Information Society services, from impairing them.

Does the proposed action fall within an exclusive competence of the Community or within a competence shared with the Member States?

The proposed action falls within an exclusive competence of the Community (Article 7a).

What means of action does the Community have at its disposal (recommendation, financial support, legislation, mutual recognition, etc.)?

Directive for the co-ordination of laws (Article 57(2)) or measures for the approximation of laws (Article 100a).

Is a uniform set of rules necessary, or would a Directive imposing general objectives and leaving the task of implementation to the Member States be sufficient?

The purpose of the proposed initiative is not to harmonise the Member States' substantive law, but merely to lay down an information procedure coupled with a procedure aimed at co-ordinating future rules and regulations, so as to improve the application of Articles 52 and 59 of the Treaty and to identify more clearly any need for Community action.

IV. PROPOSAL FOR A DIRECTIVE

Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 100a and 213 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure referred to in Article 189b of the Treaty,

1. Whereas, in order to promote the smooth functioning of the Internal Market, as much transparency as possible should be ensured as regards the future national rules and regulations that will apply to Information Society services by amending Directive 83/189/EEC;

2. Whereas a wide variety of services within the meaning of Articles 59 and 60 of the Treaty will benefit from the opportunities afforded by the Information Society for being provided at a distance, electronically and on the individual request of a service receiver;

3. Whereas the area without internal frontiers of which the Internal Market consists enables the providers of such services to develop their cross-border activities with a view to increasing their competitiveness, and thus affords ordinary citizens new opportunities for transmitting and receiving information regardless of frontiers, and consumers new forms of access to goods or services;

4. Whereas the various social, societal and cultural implications of the advent of the Information Society may require account to be taken of the specificity of the content of such services;

5. Whereas the European Council has stressed the need to create a clear and stable legal framework at Community level in order to foster the development of the Information Society; whereas Community law and the rules governing the Internal Market in particular, including both the principles enshrined in the Treaty and secondary legislation, already constitute a basic legal framework for the growth of such services;

6. Whereas the current national rules and regulations applicable to existing services will have to be adapted to take account of the new Information Society services, either with a view to ensuring that the general interest is better safeguarded or, on the contrary, with a view to simplifying them where their application is disproportionate to the objectives they pursue;

7. Whereas, without co-ordination at Community level, this foreseeable regulatory activity at national level might result in restrictions to the free movement of services and the freedom of establishment, leading in turn to a refragmentation of the Internal Market, overregulation and regulatory inconsistencies;

8. Whereas, in order to ensure real and effective protection of the general interest objectives which play a part in the development of the Information Society, there is a need for a co-ordinated approach at Community level when dealing with questions relating to activities with such highly transnational connotations as the new services have;

8.bis. Whereas there already exists Community harmonisation for telecommunication services and that the existing Community legislation foresees adaptations to account for technological developments and the supply of new services;

9. Whereas, for the other less well-known fields of the Information Society it would be premature, however, to co-ordinate such rules and regulations by means of an extensive or exhaustive harmonisation at Community level of the substantive law, given, first, that neither the form the new services will take nor their nature is sufficiently well known, secondly, that there is as yet at national level no specific regulatory activity in this field, and, thirdly, that the need for and content of such harmonisation in the light of the Internal Market cannot be defined at this stage;

10. Whereas it is therefore necessary to preserve the smooth functioning of the area without internal frontiers and to avert the risks of refragmentation by providing for a procedure for the provision of information, the holding of consultations, and administrative co-operation in respect of the new draft rules and regulations; whereas such a procedure will contribute *inter alia* to ensure that the Treaty, in particular Articles 52 and 59 thereof, is effectively applied, and, where appropriate, to detect the need to safeguard the general interest at Community level; whereas, moreover, the improved application of the Treaty made possible by such an information procedure will have the effect of reducing the need for Community rules to that which is strictly necessary and proportional in the light of the Internal Market and of the protection of general interest objectives; whereas, lastly, such a procedure will enable businesses to exploit the advantages of the Internal Market more effectively;

11. Whereas Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations pursues the same objectives; whereas this procedure is effective, being the most comprehensive one for attaining these objectives; whereas the experience that has been gained in implementing the Directive and the procedures provided for therein can be applied to draft rules on Information Society services; whereas the procedure it lays down is now well established among national authorities;

12. Whereas, moreover, in accordance with Article 7a of the Treaty, the Internal Market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured; whereas Directive 83/189/EEC provides only for an administrative co-operation procedure and not for any harmonisation of substantive rules;

13. Whereas, therefore, amendment of Directive 83/189/EEC with a view to applying it to draft rules and regulations on Information Society services is the approach best suited to meeting effectively the need for transparency in the Internal Market as far as the legal framework for Information Society services is concerned;

14. Whereas, in view of the diversity of Information Society services and their future growth, notification should be provided for only in the case of rules which are likely to evolve in future; whereas the services which are likely to necessitate and generate the largest number of new rules and regulations are those which are provided at a distance, electronically, and

on the individual request of a service receiver; whereas provision must accordingly be made for the notification of draft rules and regulations relating to such services;

15. Whereas specific rules on the taking-up and pursuit of service activities which are capable of being carried on in the manner described above should thus be communicated even where they are included in a set of rules and regulations with a more general purpose; whereas, however, general rules which do not contain any specific provision concerning such services should not be notified;

16. Whereas "rules on the taking-up and pursuit of service activities" means rules laying down any form of requirement, such as those relating to service providers, services and service receivers and to an economic activity capable of being provided electronically, at a distance and on the individual request of the service receiver; whereas, for example, rules on the establishment of service providers, in particular those on authorisation or licensing arrangements, are thus covered; whereas shall be considered as such a rule a provision specifically aimed at Information Society services even if part of a more general regulation;

17. Whereas this Directive is without prejudice to the scope of Council Directive 89/552/EC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities such as modified by directive 96/.../EC of the European Parliament and the Council or any future modification of that directive;

18. Whereas this Directive is without prejudice to the negotiations concerning and the content of the proposal for a European Parliament and Council Directive on a common framework for general authorisations and individual licences for telecommunications services;

19. Whereas, at all events, this Directive does not cover the drafts of national provisions aimed at implementing the content of Community Directives in force or awaiting adoption inasmuch as they already form the subject-matter of a specific examination; whereas it accordingly does not cover either national rules and regulations implementing theCouncil Directive 89/552/EC amending the above-mentioned Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities such as modified by directive 96/.../EC of the European Parliament and the Council or any future modification of that directive or national rules and regulations implementing the future Directive on a common framework for general authorisations and individual licences for telecommunications services;

20. Whereas definition of the framework for the provision of information and the holding of consultations at Community level as established by this Directive is a precondition for a co-ordinated and effective participation by the European Community in work involving matters relating to the regulatory aspects of Information Society services in the international context;

21. Whereas this Directive seeks to amend Directive 83/189/EEC, which for its part (with the exception of Article 43) is based on Articles 100a and 213 of the Treaty; whereas there should be a degree of consistency in the legal bases used for the same Directive;

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 83/189/EEC is amended as follows:

1. The title of the Directive is replaced by the following:
   European Parliament and Council Directive laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.

2. Article 1 is amended as follows:
   (a) a new point is added after point 1:
   2. "service", any service provided at a distance, by electronic means and on the individual request of a service receiver;

   (b) points 2 and 3 become points 3 and 4 respectively;

   (c) a new point 5 is added:
   5. "rule on services", a requirement relating to the taking-up and pursuit of service activities within the meaning of point 2 of this Article, and in particular provisions concerning the service provider, the services and the service receiver, to the exclusion of any rules that are not specifically aimed at the services defined within this same point;

   (d) points 4 to 10 become points 6 to 12;

   (e) the first paragraph of point 9 (new point 11) is replaced by the following:
   "technical regulation", technical specifications and other requirements or a rule on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service or establishment as a service provider.

   De facto technical regulations include:

   - *laws, regulations or administrative provisions of a Member State which refer either to technical specifications or other requirements or rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or other requirements or rules on services and compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,*

   - *voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications;*

   - *technical specifications or other requirements which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other*

requirements or rules on services linked to national social-security systems are not included.

(f) point 10 (new point 12) is replaced by the following:

12. "draft technical regulation", the text of a technical specification or other requirement or of a rule on services, including administrative provisions formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.

3. The last subparagraph of Article 8(1) is replaced by the following:
With respect to the technical specifications or other requirements or rules on services referred to in the third indent of the second paragraph of point 11 of Article 1, the detailed comments or opinions of the Commission or the Member States may concern only the aspect which may hinder trade or the free movement of services and not the fiscal or financial aspect of the measure.

4. Article 9 is modified as follows
a) The first paragraph of point 2 is replaced by the following:
Member States shall postpone:
- *for four months the adoption of a draft technical regulation in the form of a voluntary agreement within the meaning of the second indent of the second paragraph of point 11 of Article 1,*
- *without prejudice to paragraphs 3, 4 and 5, for six months the adoption of any other draft technical regulation,*

from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods or services or to the freedom of establishment of operators within the Internal Market.
b) point 7 is replaced with the following text:
Paragraphs 1 to 5 shall not apply in those cases where, for urgent reasons, occasioned by serious and unforeseeable circumstances, relating to the protection of public health or safety, the protection of animals or the preservation of plants, and for rules relating to services also for public order, a Member State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible. The Member State shall give, in the communication referred to in Article 8, the reasons which warrant the urgency of the measures taken. The Commission shall give its views on the communication as soon as possible. It shall take appropriate action in cases where improper use is made of this procedure. The European Parliament shall be kept informed by the Commission.

5. Article 10 is amended as follows:

(a) the first and second indents of paragraph 1 are replaced by the following:
- *comply with binding Community acts which result in the adoption of technical specifications or rules on services;*
- *fulfil the obligations arising out of international agreements which result in the adoption of common technical specifications or rules on services in the Community;*

(b) the sixth indent of paragraph 1 is replaced by the following:

- *restrict themselves to amending a technical regulation within the meaning of point 11 of Article 1 of this Directive, in accordance with a Commission request, with a view to removing an obstacle to trade or the free movement of services;*

(c) in paragraphs 3 and 4 the reference to Article 1(9) is replaced by: *point 11 of Article 1;*

(d) paragraph 4 is amended as follows:

4. Article 9 shall not apply to the technical specifications or other requirements or the rules on services referred to in the third indent of the second paragraph of point 11 of Article 1.

Article 2

1. Member States shall bring into force the regulations and administrative provisions necessary to comply with this Directive by 31/12/97. at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate the main provisions of national law which they adopt in the field covered by this Directive to the Commission.

Article 3

This Directive is addressed to the Member States.

Done at Brussels,

FINANCIAL STATEMENT

1. TITLE OF OPERATION

Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations

2. BUDGET HEADING INVOLVED

A2510: Committees whose consultation is compulsory.

3. LEGAL BASIS

Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations

4. DESCRIPTION OF OPERATION

4.1 General objective

The proposal for a directive is designed to introduce a procedure for the supply of information and administrative cooperation between national and Community authorities regarding rules and regulations on Information Society services. In particular, each Member State would be required to notify the Commission and the other Member States of draft national rules and regulations relating to such services. They would enter into force only after a minimum three-month standstill period had elapsed in which checks would be made to ensure that the draft legislation was consistent and compatible with existing Community law, and in particular with internal market rules.

4.2 Period covered and arrangements for renewal

The Committee set up under Articles 5 and 6 of Directive 83/189/EEC could begin to carry out these tasks relating to Information Society services immediately after the adoption of the above-mentioned proposal (possibly from 1997) in order to facilitate, first, its transposal and, second, its operation.

5. CLASSIFICATION OF EXPENDITURE

5.1 Non-compulsory expenditure
5.2 Non-differentiated appropriations

6. TYPE OF EXPENDITURE

6.1 Type of expenditure

Refund of travel and living expenses incurred by members of the Standing Committee on Technical Standards and Regulations (committee 03C0210) in attending additional meetings necessitated by the adoption of the above-mentioned proposal for a directive.

7. FINANCIAL IMPACT (on Part B)

None

8. FRAUD PREVENTION MEASURES

Refund applications will be checked by the Committee's secretariat in DG XV.

9. ELEMENTS OF COST-EFFECTIVENESS ANALYSIS

9.1 Specific and quantifiable objectives; target population

The aim of the proposal is to safeguard and facilitate the functioning of the internal market by forestalling the adoption of rules and regulations that are inconsistent and incompatible with internal market freedoms. Any refragmentation of the internal market would compromise the economic growth of the on-line services sector which is expanding rapidly (the number of Internet users worldwide is increasing by approximately 1 million a year).

There will be investment in the new services sector if development prospects at Community level are assured; legally fragmented national markets would not be sufficiently profitable to sustain investment programmes.

9.2 Grounds for the operation

This initiative relates to the operation of the internal market, for which the Community has sole responsibility; subsidiarity is not therefore applicable in this case.

The proposal does not provide for harmonization or lay down rules of substantive law.

It simply contains procedural rules, making use of the committee which is already operating under the Directive to be amended (83/189/EEC) and which has already proved its worth for more than a decade.

Given the many legislative initiatives currently under preparation in the Member States to help meet the needs arising from the advent of the Information Society, a coordinated Community approach to the new services, which are by definition cross-frontier in nature, is necessary both in order to safeguard the development of this economic sector in the internal market and to provide more effective protection for pertinent general interests (such as the protection of minors, consumers, public morality, etc.)

Furthermore, the non-confidential nature of the information to be notified under the Directive also takes account of the desire of economic operators in the sector to express their views on future legislative initiatives within a regulatory framework that is sufficiently transparent, consistent and stable for them to carry out and develop their activities.

Finally, failure to introduce the proposed mechanism could pose a problem as regards the internal resources the Commission would require to administer any infringement proceedings brought in respect of future national legislation that was incompatible with Community law.

9.3 Monitoring and evaluation of the operation

Article 3 of the Directive provides for the Commission to report to Parliament and the Economic and Social Committee every two years on the results of applying the Directive. Any proposals for adjusting the proposed system could be put forward then.

10. ADMINISTRATIVE EXPENDITURE (PART A OF SECTION III OF THE GENERAL BUDGET)

Actual mobilization of the necessary administrative resources will result from the Commission's annual decision on the allocation of resources, which depends in particular on the additional staff and appropriations earmarked by the budgetary authority.

10.1 Impact on the number of posts

Type of post		Staff to be assigned to the administration of the operation		of which		duration
		permanent posts	temporary posts	use of existing resources within the DG or department concerned	use of additional resources	
Officials or temporary staff	A B C	1 1		1 1		indefinite indefinite
Other resources						
Total		2		2		

10.2 Overall financial impact of the additional human resources

Not applicable

	Amounts	Method of calculation
Officials Temporary staff Other resources		
Total		

10.3 Increase in other administrative expenditure arising from the operation

Budget heading (No and title)	**Amounts**	**Method of calculation**
A2510 committees whose consultation is compulsory	22 000	15 experts from the Member States attending two additional meetings a year of the Standing Committee on Technical Standards and Regulations 2 x ECU 11 000 (average cost) = ECU 22 000
Total	22 000	

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