



EUROPEAN COMMISSION

**US PERSPECTIVES ON CONSUMER PROTECTION IN THE GLOBAL ELECTRONIC
MARKETPLACE**

Federal Trade Commission Notice requesting academic papers and public comment

Comments by the European Commission

30 April 1999



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EXECUTIVE SUMMARY

1. The European Commission welcomes the Federal Trade Commission's invitation to comment on questions relating to consumer protection in the global marketplace.
2. As consumers take-up electronic commerce to obtain market information and purchase goods and services, the number of direct cross-border activities involving consumers will increase dramatically. An analysis of the international dimension of consumer protection in electronic commerce is therefore essential.
3. The Communication "A European Initiative in Electronic Commerce" of April 1997, sets out the European Commission's overall strategy and general policy direction with regard to electronic commerce. This Communication raised a number of questions of cross-border electronic trade and consumer protection. The international conference in Bonn from 6 – 8 July 1997 resulted in agreements between governments, users and industry on certain principles regarding global electronic commerce. The European Commission's overall strategy and policy guidelines are further being developed through a number of specific initiatives covering *inter alia* self regulation, encryption and electronic signatures, copyright and related rights, globalisation and international co-ordination, standardisation, taxation, commercial communications, electronic contracts, responsibility of intermediaries, cross-border redress, the out-of-court settlement of disputes, etc.
4. One of the key objectives of the European Union is to ensure that goods, services, capital and people can move freely from Member State to Member State. The initiatives presented by the European Commission aim at removing legal and technical obstacles for cross-border electronic transactions. Progress is being made to ensure that the principles underpinning the Single Market are ensured in the online world, hence creating a single electronic marketplace.
5. In creating favourable conditions for the cross-border supply and demand for goods and services, consumer protection plays a crucial role. In this respect the European Commission aims at:

Consumer Protection in the Global Electronic Marketplace - Comments by the European Commission

- harmonising and co-ordinating Member States positions on core elements of consumer policy and protection to avoid that major differences in consumer protection rules result in effective obstacles to cross-border electronic commerce;
 - enhancing the level of consumer confidence in electronic commerce which, while offering major potential advantages to consumers, also creates new situations with which consumers are not familiar and where they may fear their interests are put at risk, in particular when dealing with suppliers in other countries.
6. Notwithstanding the number of initiatives currently undertaken, it is important to note that electronic commerce is not taking place within a legal or policy vacuum. The initiatives referred to above do not aim at creating a new framework, separate from the framework for off-line commerce, but rather to complete and adapt, where necessary, the existing framework with regard to electronic commerce. This is in particular the case with regard to consumer protection. The focus is not on regulating the Internet but on enabling electronic commerce both from a supply and demand perspective.
 7. In the European Union, a body of law and policy on consumer protection already exists that facilitates the cross-border trade of goods and services and that enhances consumer confidence in cross-border transactions. The underlying objective of this framework is to adjust market and information imbalances between suppliers and consumers, and to contribute to protecting consumers from fraudulent, deceptive and unfair practices.
 8. The existing framework is generally applicable to electronic commerce and covers all the stages of the business-to-consumer commercial relationship, including commercial communications (advertising, promotion and marketing) of goods or services, (pre-) contractual information and disclosures, contract formation, payment, delivery, guarantees and after-sales services and ultimately redress.
 9. The legal framework in place in the European Union reflects the principles and commitments agreed to by the EU Member States in the EU Treaty. This includes the establishment of a single market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.
 10. To ensure that electronic commerce can fully develop within a sound, predictable and internationally co-ordinated framework, the focus as regards consumer policy in completing and adapting the framework is based on the following considerations:
 - Consumer interests should be taken into account in all relevant initiatives aimed at furthering the development of electronic commerce.
 - When making use of electronic commerce, consumers should not be less well protected than they are when using traditional forms of commerce. The level of protection afforded in electronic commerce must, in its effect, be equivalent to the level of protection afforded to off-line commerce.
 - Existing rules must be assessed in the light of electronic commerce, to verify whether they are adapted to the new circumstances arising from electronic commerce. The principles underlying existing rules should be guaranteed in the online environment, to ensure an equivalent level of protection.
 - As a result of the inherent international character of electronic commerce, the core elements of consumer protection must be co-ordinated at international level. In addition to creating a framework that enables the (cross-border) supply of goods and services through electronic commerce, policy makers should also focus their attention on creating a framework that enables (cross-border) demand of goods and services through electronic commerce. Co-ordination of core elements of consumer protection will result in a situation where:

- suppliers offering goods and services across borders are not confronted by consumer protection rules and consumer expectations with which they are completely unfamiliar;
 - consumers can confidently participate in electronic commerce with suppliers in other countries knowing that the essential elements of consumer protection they are familiar with and rely on are guaranteed regardless of where the supplier is established or where he is operating from.
- Enforcement authorities around the world are faced with the dilemma that while the law operates on a territorial basis, electronic commerce operates on a global basis. Although enforcement issues in cross-border situations are not new, electronic commerce brings about a completely new dimension, which requires enhanced international co-operation and co-ordination as well as a re-assessment of conventional procedures.
11. In view of the international dimension of electronic commerce, international organisations are playing an active consensus-building role. In this respect, we recognise the importance of the work taking place within international forums such as the WTO, the OECD and UNCITRAL and look forward to the results of this work.
 12. We are encouraged to see that the Federal Trade Commission shares our analysis regarding the need to examine the cross-border dimension to legal problems affecting consumers as business-to-consumer electronic commerce takes off. In its examination, the Federal Trade Commission may wish to make use of the experience gained within the European Union as regards the cross-border dimension of consumer protection in the development of a cross-border (electronic) marketplace.

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30/04/1999



EUROPEAN COMMISSION

US PERSPECTIVES ON CONSUMER PROTECTION IN THE GLOBAL ELECTRONIC MARKETPLACE

Federal Trade Commission invitation for academic papers and public comment

Comments by the European Commission

DETAIL

Part I: Introduction and General Principles

1. We welcome the FTC's invitation to comment on questions relating to consumer protection in the global marketplace and note the announcement of a public workshop in June 1999, which will examine the US perspectives in this important area.
2. We believe that an analysis of the international dimension of consumer protection in electronic commerce is indeed appropriate given that electronic commerce offers unprecedented opportunities to consumers to purchase goods and services from suppliers abroad. This creates also new challenges as regards consumer confidence and consumer protection including the enforcement of consumer protection rules. We observe that most of the problems with which we are confronted in this new electronic environment are not new in character, but it is the scale that is different. Electronic commerce is giving rise to a greater volume of consumer transactions with foreign firms, which gives the problem a new dimension. Conventional procedures have to be reassessed in this light.
3. The Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions "A European Initiative in Electronic Commerce"¹ of April 1997, sets out the overall strategy and policy direction of the European Commission with regard to electronic commerce. This Communication also raised questions of cross-border electronic trade. In this regard an international conference was held in Bonn from 6 – 8 July 1997. This conference resulted in agreements between governments, users and industry on certain principles regarding global electronic commerce.
4. Over the last two years the European Commission has been implementing the overall strategy, developing the various policy lines in more depth. On the areas in which the Federal Trade Commission has expressed an interest through its invitation for comments, the following specific initiatives could be seen as particularly relevant:

¹ COM(97) 157 final

- Communication from the Commission to the Council, the European Parliament, the Economic and social Committee and the Committee of the Regions - Ensuring security and trust in electronic communication - Towards a European framework for digital signatures and encryption²
 - Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society³
 - Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Globalisation and the Information Society - The need for strengthened international co-ordination⁴
 - Proposal for a European Parliament and Council Directive on a common framework for electronic signatures⁵
 - Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee - Electronic commerce and indirect taxation⁶
 - Communication from the Commission to the European Parliament, the Council, the European Central Bank and the Economic and Social Committee - A framework for action on combating fraud and counterfeiting of non- cash means of payment⁷
 - Proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC⁸
 - Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market⁹
 - Action Plan on promoting safer use of the Internet¹⁰
5. In the Communication on ‘Globalisation and the Information Society: the need for strengthened international co-ordination’ the European Commission sought to draw the attention of the international community to the fact that the legal and technical aspects of the global electronic marketplace cannot be addressed effectively in isolation and that policymakers and market players should work together to ensure a consistent approach at global level. This has resulted in a business-led initiative – the Global Business Dialogue on electronic commerce (GBDe) – which is examining many of the issues referred to in both the FTC notice and the Commission’s Communication, including jurisdiction and consumer confidence, and which intends to put forward recommendations in this regard.
6. The existing international organisations are also playing an active and consensus-building role. In this respect we recognise the importance of the work taking place within international forums such as the WTO, the OECD and UNCITRAL and look forward to the results of this work.

² COM(97) 503 final

³ COM(97) 628 final - Official Journal C 108 , 07/04/1998 p. 0006

⁴ COM(98) 50 final

⁵ COM(98) 297 final - Official Journal C 325 , 23/10/1998 p. 0005

⁶ COM(98) 374 final

⁷ COM(98) 395 final

⁸ COM(98)468 final - Official Journal C 385 , 11/12/1998 p. 0010

⁹ COM(98) 586 final - Official Journal C 030 , 05/02/1999 p. 0004

¹⁰ Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multi-annual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks

7. Within the European Union, progress has been made on creating a single electronic marketplace. The proposal for Directive on certain legal aspects of electronic commerce in the Internal Market and the proposal for Directive on a common framework for electronic signatures will further contribute to removing legal obstacles for cross-border electronic transactions within the European Union. The services of the European Commission have extensive experience in the problems resulting from cross-border consumer transactions. In developing its perspectives on consumer protection in the global electronic market place, the FTC may wish to make use of the experience gained within the European Union. It is against this background that this paper is submitted.
8. We consider that consumer protection is an important dimension of all the stages of business-to-consumer commercial relationship, ranging from commercial communications (advertising, promotion and marketing) of goods or services, over (pre-) contractual information and disclosures, contract formation, payment, delivery, guarantees and after sales services and ultimately redress.
9. A closer analysis of the questions set forth in the invitation to comment shows that they cover this entire range of activities or stages and we are encouraged to see that the FTC shares our analysis regarding the need to examine the cross-border dimension to legal problems affecting consumers as business-to-consumer electronic commerce takes off.
10. As set out in the Communication, "A European Initiative in Electronic Commerce", electronic commerce is not taking place within a legal vacuum for which a framework needs to be created. This is in particular true for the legal framework pertaining to consumer protection that has been developed and that generally speaking is applicable to electronic commerce.
11. Within the framework of the European Union, a body of Law has been created to ensure consumer protection, covering all of the above mentioned stages. By and large, this legislation has a general nature and is not specifically directed at one or the other sector or technologically specific form of commercial activity. As a consequence it is also applicable to electronic commerce. Part II of this paper sets out for each stage of the business-to-consumer commercial relationship the substantive consumer protection provisions most relevant to electronic commerce as well as some general issues. A brief description of the applicable rules and principles is given, together with references to the source of these principles and rules. For an in-depth analysis of the relevant provisions, use should be made of the actual sources as well and European Court of Justice case law in this respect. Furthermore, it is important to bear in mind that the European Community contributes to the level of protection afforded by the Member States and that therefore many EU consumer protection rules are 'minimum' requirements. The Member States are, within the limits of the Treaty, in many cases free to introduce or maintain provisions aiming at a higher level of consumer protection.
12. In addition to the horizontally applicable rules, there are also a number of sector or product/service specific rules. These fall outside the scope of this paper and are not included in the overview, unless otherwise indicated.

Part II: Overview of Substantive European Community Consumer Protection Provisions relevant to Electronic Commerce

II.1 Business-to-consumer Commercial Relationship – European Community consumer protection rules

A. Commercial Communications/Advertising and Promotion

13. As regards advertising and promotion of goods and services, the following Directives and initiatives are particularly relevant:

- *Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising*¹¹
- *Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising*¹²
- *Council Directive 89/552/EEC of 3 October 1989 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*¹³ as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997¹⁴
- *Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use*¹⁵
- *Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products*¹⁶
- *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts*¹⁷
- *Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector*¹⁸
- *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee - The follow-up to the Green Paper on commercial communications in the internal market*¹⁹

¹¹ Official Journal L 290 , 23/10/1997 p. 0018 – 0023 (with corrigendum in Official Journal L 194 , 10/07/1998 p. 0054)

¹² Official Journal L 250 , 19/09/1984 p. 0017 - 0020

¹³ Official Journal L 298 , 17/10/1989 p. 0023 – 0030 (with corrigendum in Official Journal L 331 , 16/11/1989 p. 0051)

¹⁴ Official Journal L 202 , 30/07/1997 p. 0060 - 0071

¹⁵ Official Journal L 113 , 30/04/1992 p. 0013 - 0018

¹⁶ Official Journal L 213 , 30/07/1998 p. 0009 - 0012

¹⁷ Official Journal L 144 , 04/06/1997 p. 0019 - 0027

¹⁸ Official Journal L 024 , 30/01/1998 p. 0001 - 0008

¹⁹ COM(98)121 final

- *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic Commerce in the Internal Market*²⁰.
14. One of the objectives of rules on advertising is to protect consumers against misleading advertising and the unfair consequences thereof. Misleading advertising is defined as any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.
15. Within this context, comparative advertising is permitted if:
- it is not misleading;
 - compares goods or services meeting the same needs or intended for the same purpose;
 - it compares objectively one or more material, relevant, verifiable and representative features;
 - it does not create confusion between an advertiser and competitor, or between advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
 - it does not discredit or denigrate the trademarks, trade names, etc. of a competitor;
 - it does not take unfair advantage of the reputation of trade marks, trade names, etc. of a competitor.
16. As regards television advertising, sponsorship and teleshopping, Directive 89/552 as amended by Directive 97/36, contains a number of specific provisions. These are specifically intended for television broadcasts and as such only cover electronic commerce to the extent the electronic commercial activity takes place within the context of a television broadcast or vice versa. In this respect it is probably useful to highlight that, as a basis for the application of the country of origin principle, the following rules apply:
- Television advertising and teleshopping must be readily recognisable as such and kept separate from other parts of the programme service.
 - Advertising and teleshopping may not use subliminal techniques
 - Surreptitious advertising and teleshopping²¹ is prohibited
 - Television advertising and teleshopping may not:
 - prejudice respect for human dignity;
 - include any discrimination on grounds of race, sex or nationality;
 - be offensive to religious or political beliefs
 - encourage behaviour prejudicial to health or safety;
 - encourage behaviour prejudicial to the protection of the environment
 - All forms of television advertising and teleshopping for cigarettes and other tobacco products is prohibited.
 - Television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls is prohibited.
 - Teleshopping for medicinal products which are subject to marketing authorisation as well as teleshopping for medicinal treatment is prohibited.
 - Television advertising and teleshopping for alcoholic beverages must comply with the following criteria:

²⁰ COM(98)586 final; Official Journal C 030 , 05/02/1999 p. 0004

²¹ Surreptitious advertising and teleshopping is defined as the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.

- it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
 - it may not link the consumption of alcohol to enhanced physical performance or to driving;
 - it may not create the impression that the consumption of alcohol contributes towards social or sexual success;
 - it may not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
 - it may not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
 - it may not place emphasis on high alcoholic content as being a positive quality of the beverages.
- Television advertising may not cause moral or physical detriment to minors. Therefore it must comply with the following criteria for their protection:
 - it may not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;
 - it may not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;
 - it may not exploit the special trust minors place in parents, teachers or other persons;
 - it may not unreasonably show minors in dangerous situations.
 - Teleshopping must also comply with these criteria and may not exhort minors to contract for the sale or rental of goods and services
17. The proposal for a Directive on certain legal aspects of electronic commerce in the internal market, currently being examined by the Council and the European Parliament, will complete this framework with the following rules applying specifically to on-line commercial communications:
- Commercial communications must be clearly identifiable as commercial communications;
 - The natural or legal person on whose behalf the commercial communication is made must be clearly identifiable;
 - Promotional offers, such as discounts, premiums and gifts, where authorised, must be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented accurately and unequivocally;
 - Promotional competitions or games, where authorised, must be clearly identifiable as such, and the conditions for participation must be easily accessible and be presented accurately and unequivocally;
 - Where it concerns unsolicited commercial communication by electronic mail, they must be clearly and unequivocally identifiable as such as soon as it is received by the recipient.

Commercial communications emanating from a service provider established in the European Community would be subject to the country of origin control. This means that the service provider will have to comply with the rules of the country in which he is established and will benefit from the free provision of services throughout the Community. The expectation that consumers are adequately protected by the legislation of the country of origin of the service provider reflects the high level of integration among Member States of the European Community. The right to free provision of services in the European Community on the basis of home country control does not apply to service providers established in third countries.

18. Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts ²², contains provisions that are relevant as regards the use of certain means of distance communication.

²² Official Journal L 144 , 04/06/1997 p. 0019 - 0027

Under these, the prior consent of the consumer is required for the use of automated calling machines without human intervention, as well as facsimile machines. As regards all other means of distance communication, these may only be used where there is no clear objection from the consumer. Almost identical provisions are set out in Directive 97/66 of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector²³ and the proposal for Directive concerning distance marketing of consumer financial services.²⁴ The latter two clarify that the choice between a requirement of prior consent ('opt in') or the possibility for the consumer to indicate that he does not wish to receive unsolicited messages ('opt out') is a matter to be determined by each Member State through national legislation.

B. Information to be provided before the conclusion of the contract²⁵

19. Pre-contractual information, as well as information on the contract itself are crucial for the consumer to enable him to take informed decisions. In EU legislation there is a distinction in the legal obligations as regards the information that must be provided, depending on whether the contract is negotiated at a distance, or outside the premises of the seller, or not. In fact, where the transaction takes place at a distance, the explicit information obligations are higher. This is justified on the basis of the fact that when the contract takes place with the simultaneous presence of both parties, or in the premises of the seller, the information obligation on a number of elements would be superfluous as they are immediately clear or obvious to the consumer.

20. The following Directives and initiatives are the most relevant:

- *Directives 97/7 of the Council and the European Parliament of 20 May 1997 on the protection of consumers in respect of distance contracts*²⁶
- *Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers*²⁷
- *Proposal for a European Parliament and Council Directive on certain legal aspects of Electronic Commerce in the Internal Market*²⁸

21. In this respect there are also a number of sector or product/service specific obligations and requirements. It would lead too far to list them all, as for the purposes of this paper it is preferable to limit the listing to the generally applicable principles.

22. In the information obligation, a distinction can be made between three kinds of information:

- Information on the identity of the seller
- Information on the goods or services on offer
- Information on the contract (contract formation, contractual rights and obligations, etc.)²⁹

²³ Official Journal L24, 30/01/1998, p. 1-8

²⁴ Official Journal C 385, 11/12/1998, p. 10

²⁵ The distinction between advertising/commercial communications and information that is to be provided before entering into a contract is not always clearly defined. In this respect it may be useful to bear in mind that information provided in advertising or other forms of commercial communications that has a determining influence on the consumer's decision to contract, may be considered as being information provided before the conclusion of the contract.

²⁶ Official Journal L 144 , 04/06/1997 p. 0019 - 0027

²⁷ Official Journal L 080 , 18/03/1998 p. 0027 – 0031 (With corrigendum in Official Journal L 190 , 04/07/1998 p. 0086)

²⁸ COM(98) 586 final - Official Journal C 30 , 05/02/1999 p. 0004

23. These three types of information must, generally speaking comply with the provisions on the 'quality of the information'. In this respect Directive 97/7 on the protection of consumers in respect of distance contracts, specifies that the information, the commercial purposes of which must be made clear, must be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable to give their consent, such as minors.
- (i) *Identity of the seller*
24. Directive 97/7 provides that in good time, prior to the conclusion of any distant contract, the consumer must be provided with information on the supplier, and in case of contracts requiring payment in advance, his address.
25. In the case of telephone communications, the identity of the supplier and the commercial purpose of the call must be made explicitly clear at the beginning of any conversation with the consumer.
26. The European Commission believes that as regards information society services, additional provisions on the identification of the supplier should apply. The proposal for a Directive on certain legal aspects of electronic commerce in the Internal Market establishes general information to be provided by the service provider regardless of whether a contract is going to be concluded or not. In this respect it complements and further specifies Community provisions dealing with the identity of the seller. The proposed Directive stipulates that information society services will have to render easily accessible, in a direct and permanent manner the following information:
- the name of the service provider;
 - the address at which the service provider is established;
 - the particulars of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
 - where the service provider is registered in a trade register, the trade register in which the service provider is entered and his registration number in the register;
 - where the activity is subject to an authorisation scheme, the activities covered by the authorisation granted to the service provider and the particulars of the authority providing such authorisation;
 - with regard to regulated professions:
 - any professional body or similar institution with which the service provider is registered;
 - the professional title granted in the Member State of establishment, the applicable professional rules and the Member States in which the services are regularly provided;
 - where the service provider undertakes an activity that is subject to VAT, the VAT number under which he is registered with the fiscal administration.
27. This information obligation would be more stringent than that applying to off-line (distance) commerce. In view of the need to ensure consumer confidence in electronic commerce, and bearing in mind the special characteristics of the technology and of information society services, this is justified. It should be noted that the additional cost of providing the information to consumers is, due to the advantages of the information technology, only a fraction of what would have been the cost in more traditional means of commerce.

²⁹ The distinction between the different types of information is not always clearly defined and in some respects it is theoretical. Arguably some elements covered in this paper under information on the goods and services on offer can also feature under the heading information on the contract.

(ii) Information on the goods and services on offer

28. In this regard Directive 97/7 on the protection of consumers in respect of distance contracts provides that in good time, prior to the conclusion of any distant contract, the consumer must be provided with information on:
- the main characteristics of the goods or services
 - the price of the goods or services including all taxes, bearing in mind that consumption tax should be imposed in the jurisdiction of consumption, as agreed at the OECD Ottawa Ministerial Conference in October 1998.
 - delivery costs, where appropriate
 - the cost of using the means of distance communication, where it is calculated other than at the basic rate
 - the period for which the offer or the price remains valid
 - where appropriate, the minimum duration of the contract in the case of a contract for the supply of goods or services to be performed permanently or recurrently
29. Directive 97/7 is not applicable to financial services. The proposal for Directive on distance marketing of financial services does not contain comparable information obligation provisions on the financial services being offered, as these requirements tend to be covered by the sector and product specific regulations.
30. Directive 98/6 on consumer protection in the indication of the prices of products offered to consumers stipulates the indication of the selling price and the price per unit of measurement of products offered by traders to consumers. The objective is to improve consumer information and to facilitate comparison of prices.
31. In addition to this obligation on the price indication of products offered to consumers, the European Commission proposed in the proposal for a Directive on certain legal aspects of electronic commerce in the Internal Market, that also the prices of information society services be indicated accurately and unequivocally.

(iii) Information on the contract and contractual obligations

32. As regards the 'contractual information', Directive 97/7 contains, over and above the elements referred to under the previous two points also the obligation to provide information on
- the arrangements for payment, delivery or performance
 - the existence of a right of withdrawal
33. In view of the nature of the technology used and bearing in mind the need to enhance and ensure consumer confidence, the proposal for a Directive on certain legal aspects of electronic commerce in the Internal Market includes additional information obligations as regards the technical aspects of the formation of the contract. With electronic commerce, technically new means to conclude contracts are becoming available. In order to ensure that consumers can benefit from these opportunities, these new means of concluding contracts, with which they are not familiar should be explained to them.
34. The proposed information obligation on the conclusion of (electronic) contracts provides that the service provider must explain the manner of the formation of a contract by electronic means. This must be done clearly and unequivocally, prior to the conclusion of the contract, in such a way as to ensure that parties can give their full and informed consent. This information would include:
- the different stages to follow to conclude the contract;
 - whether or not the concluded contract will be filed and whether it will be accessible;
 - the expedients for correcting and handling errors.

35. Also, the proposal for Directive on distance marketing of financial services contains a number of relevant provisions. Given that these are sector specific for financial services, and notwithstanding the fact that financial services lend themselves particularly well for electronic commerce applications, it goes beyond the scope of this paper to set out the information obligations of this proposal in detail. The FTC nevertheless may wish to study the proposal in more depth.
36. For the three types of information (identity, the nature of the goods and services and the contract itself) to be provided prior to the conclusion of the contract, Directive 97/7 also contains important provisions as to the written confirmation of the information that is provided. In fact, 'the consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information, in good time during the performance of the contract, and at the latest at the time of delivery (...) unless the information has already been given to the consumer prior to the conclusion of the contract (...)'. In any event the following information must, except for services performed through the use of a means of distance communication, supplied on only one occasion and invoiced by the operator of the means of distance communication, be confirmed to the consumer in writing or in another durable medium:
- information on the conditions and procedures for exercising the right of withdrawal;
 - the geographical address of the place of business of the supplier to which the consumer may address any complaints;
 - information on after-sales services and guarantees which exist;
 - the conditions for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

C. Conclusion of the contract and contractual obligations

37. The most relevant Directives and initiatives in this respect are:
- *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*³⁰
 - *Directives 97/7 of the Council and the European Parliament of 20 May 1997 on the protection of consumers in respect of distance contracts*³¹
 - *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market*³²
38. The overall principles of Directive 93/13 on unfair contract terms is that unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on the consumer.
39. An unfair contract term is defined as:
- A contractual term which has not been individually negotiated, which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
 - A term is always regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
 - Where a seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect is incumbent on him.

³⁰ Official Journal L 095 , 21/04/1993 p. 0029 - 0034

³¹ Official Journal L 144 , 04/06/1997 p. 0019 - 0027

³² COM(98) 586 final - Official Journal C 30 , 05/02/1999 p. 0004

40. Furthermore, Directive 93/13 stipulates that in the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer will prevail.

41. Directive 97/7, contains a number of provisions that should be highlighted with regards to contractual obligations, namely the right of withdrawal, and inertia selling.

(i) Right of withdrawal

42. For any distance contract the consumer has a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer in relation to the exercise of his right of withdrawal is the direct cost of returning the goods. Any sums paid in advance by the consumer must be reimbursed fully, as soon as possible and in any case within 30 days.

43. A number of exceptions to the right of withdrawal are foreseen. These concern in particular:

- the provision of services if the performance has begun, with the consumer's agreement, before the end of the seven working day period;
- the supply of goods and services of which the price is dependent on fluctuations in the financial market, which cannot be controlled by the supplier;
- goods made to the consumer's specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly;
- audio or video recordings or computer software which were unsealed by the consumer.
- newspapers, periodicals and magazines;
- gaming and lottery services.

44. In this respect it is again useful to stress that this Directive does not apply to financial services and that the proposal for Directive on distance marketing of financial services contains specific provisions in this regard that will, subject to approval by the Council of Ministers and the European Parliament, apply for financial services sold at a distance.

(ii) Inertia selling

45. Under Directive 97/7 the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such a supply involved a demand for payment, is prohibited. The consumer is exempted from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.

46. Also the moment at which the contract is concluded, and thus binding on both parties, is a relevant question. For information society services, the European Commission considers it would be important ensure that, in view of the fact the consumers may not be familiar with the way in which the contract is concluded, it would be important to harmonise the rules on this. Therefore the proposed Directive on certain legal aspects of electronic commerce in the Internal Market includes a provision in this respect, which stipulates that in case where a recipient, in accepting a service provider's offer, is required to give his consent through technological means, such as clicking on an icon, the contract is concluded when the recipient of the service:

- has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance, and
- has confirmed receipt of the acknowledgement of receipt.

47. The proposed Directive also includes the obligation for the service provider to make available to consumers appropriate means allowing them to identify and correct handling errors during the process of concluding a contract and provide information to consumers about the availability of such means.

D. Payment

48. Even more than in other means of commerce, the payment and the rules governing it, are crucial elements in consumer confidence in electronic commerce.
49. As regards the payment itself there is no specific European community consumer protection legislation.³³ Some Directives or other initiatives do, however, contain relevant provisions. This is the case for:
- *Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts*³⁴
 - *Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit*³⁵
 - *Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder*³⁶
50. For payment by card – the predominant way of making payments in a business-to-consumer electronic commerce environment - Directive 97/7 provides that a consumer should be allowed :
- request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by the Directive;
 - to be recredited with the sums paid or have them returned, in the event of fraudulent use.
51. If the price of goods or services is fully or partly covered by credit granted by the supplier, or if that price is fully or partly covered by credit granted to the consumer by a third party on the basis of an agreement between the third party and the supplier, the credit agreement will be cancelled, without penalty, if the consumer exercises his right to withdraw from the contract.
52. In addition to rules covering the payment itself, particular concerns exist among consumers with regard to the safe use of payment instruments (over the Internet). Given that the integrity of communications over the Internet is not (yet) guaranteed, the transmission of payment data is an issue of great concern. In this respect it may be useful to refer to Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder.
53. This Recommendation addresses a number of issues that are relevant in the context of the contractual relationship between the issuer and the holder of the payment instrument, such as information obligations on the terms and conditions and the use of electronic payment instruments and obligations and liabilities of both parties.
54. As regards losses in consequence of the loss or theft of the electronic payment instrument, the European Commission recommends that the consumer's liability should be limited.

³³ Enhanced general protection, by means of preventive and repressive measures to combat fraud and counterfeiting involving non-cash means of payment, is suggested in the Communication from the Commission: A framework for action on combating fraud and counterfeiting of non-cash means of payment (COM(98)395 final) which includes a legislative proposal in the field of criminal law protection.

³⁴ Official Journal L 144 , 04/06/1997 p. 0019 - 0027

³⁵ Official Journal L 042 , 12/02/1987 p. 0048 – 0053 (with corrigendum in Official journal NO. L 278 , 11/10/1988 P. 0033)

³⁶ Official journal NO. L 208 , 02/08/1997 P. 0052 - 0058

- Up to the notification of the loss or theft, his liability should not exceed 150 euro, except where he/she has acted with extreme negligence or fraudulently.
- After notification the consumer should not longer be liable for any losses, except where he/she has acted fraudulently.

Where the payment has taken place without the physical presentation or electronic identification of the instrument itself, the consumer should not be liable for any losses.

55. To balance this limitation of liability, the consumer must respect his obligation to take all reasonable steps to keep his electronic payment instrument safe (including the means which enable it to be used, such as the PIN code), and must notify the issuer after becoming aware of:
- the loss or theft of the electronic payment instrument
 - the recording on his/her account of any unauthorised transaction
 - any error or other irregularity in the maintaining of his account by the issuer.

E. Guarantees

56. The following European Commission initiative will lead to a harmonisation of certain aspects of the sale of consumer goods and associated guarantees.

- *Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees*³⁷

57. The adoption of this Directive is expected before the Summer of 1999. The principles set out in the Directive will be that:

- Under the legal guarantee, the seller must deliver goods to the consumer which are in conformity with the contract of sale (e.g. comply with the description given by the seller, fit for the purpose the consumer made known to the seller, show the quality and performance which are normal in goods of the same type, taking into account *inter alia* any public statement on specific characteristics of the goods in advertising or labelling, etc.) The seller is liable to the consumer for any lack of conformity that exists at the time the goods were delivered, and which become apparent within 2 years from the delivery of the goods.

The consumer may require the seller to repair the goods or to replace them in either case free of charge. If the repair and the replacement are impossible or disproportionate, or if the seller has not completed the remedy within a reasonable time and without any significant inconvenience, the consumer may require an appropriate reduction of the price or have the contract rescinded. Unless proven otherwise, any lack of conformity which becomes manifest within six months of delivery of the goods shall be deemed to have existed at the time of delivery.

- As regards commercial guarantees, a guarantee is legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising. The guarantee must state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee. Moreover, the guarantee must be set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

³⁷ COM(95) 520 FINAL - Official Journal C 307 , 16/10/1996 p. 8; Revised proposal Official Journal C 148, 15/05/1998, p. 12 – Common Position (EC) No 51/98 adopted by the Council on 24 September 1998 - Official Journal C 333 , 30/10/1998 p. 0046

58. On request from the consumer, the guarantee must be made available in writing or feature in another durable medium available and accessible to him.

F. Settlement of disputes and redress

59. In the settlement of disputes and consumer redress, distinction must be made between the out-of-court settlement of disputes and judicial redress.

(i) Out-of-court settlement of disputes

60. We believe that it is in the best interest of all parties in a dispute that possibilities are available that allow the settlement of disputes among themselves or through an out-of-court arbitration. Many consumer disputes, by their nature, are characterised by a disproportion between the economic value at stake and the cost of its judicial settlement. The difficulties that court procedures may involve may, notably in the case of cross-border conflicts, discourage consumers from exercising their rights in practice. Experience shows that alternative dispute settlement systems have had good results, both for consumers and businesses, by reducing the cost of settling consumer disputes and the duration of the procedure. With the increase of cross-border business-to-consumer transactions that will result from the opportunities offered by electronic commerce, the need for the out-of-court settlement of disputes will increase, and the use of such mechanisms should be promoted.

61. As regards policy initiatives in this regard, the most relevant are:

- *Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes*³⁸
- *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market*³⁹

62. The Commission believes that the bodies which allow for the out-of-court settlement of disputes should meet a number of minimum criteria, namely:

63. *Independence*

The independence of the decision-making body or person should be ensured in order to guarantee the impartiality of its actions.

64. *Transparency*

Appropriate measures should be taken to ensure the transparency of the procedure. This includes the provision of information, on the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute, any preliminary requirements that the consumer may have to meet, as well as other procedural rules, the possible cost of the procedure for the parties, the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.), the decision-making arrangements within the body and the legal force of the decision taken.

65. *Adversarial principle*

The procedure to be followed allows all the parties concerned to present their viewpoint before the responsible body and to hear the arguments and facts put forward by the other party, and any experts' statements.

³⁸ Official journal NO. L 115, 17/04/98 P. 0031-0034

³⁹ COM(98) 586 final - Official Journal C 030 , 05/02/1999 p. 0004

66. *Principle of effectiveness*

The effectiveness of the procedure is ensured through measures guaranteeing:

- that the consumer has access to the procedure without being obliged to use a legal representative,
- that the procedure is free of charges or of moderate costs,
- that only short periods elapse between the referral of a matter and the decision,
- that the responsible body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.

67. *Principle of legality*

The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

68. *Principle of liberty*

The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.

The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

69. *Principle of representation*

The procedure should not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

70. These principles are also included in the proposal for Directive on certain legal aspects of electronic commerce in the Internal Market. Subject to approval by the European Parliament and the Council, these principles would become compulsory and Member States would have to ensure that the mechanism and bodies for the out-of-court settlement of disputes comply with these principles.

(ii) Court Actions

71. As set out in the above sections, a body of Community law exists that lays down rules with regard to the protection of consumers' interests. Nevertheless mechanisms available both at national and at Community level for ensuring compliance with those rules do not always allow infringements harmful to the collective interests of consumers to be terminated in good time, in particular where such infringements originate in countries other than that of the consumer.
72. Information technologies and the communication networks make it easier to move the source of an unlawful practice to another country in order to place it out of reach of enforcement. This is not only detrimental to the interest of consumers, but also constitutes a distortion of competition. Such difficulties are likely to diminish consumer confidence and may limit the scope for action by organisations representing the collective interests of consumers or independent public bodies responsible for protecting the collective interests of consumers.
73. It is therefore desirable to ensure that mechanisms are in place to enjoin the cessation of unlawful practices irrespective of the country in which the unlawful practice has produced its effects and without prejudice to the rules of private international law and relevant Conventions.

74. This issue is addressed by:
- *Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests*⁴⁰
 - *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market*⁴¹
75. Directive 98/27 sets out a framework for the creation of mechanisms to enjoin the cessation of unlawful practices within the Single Market, by defining conditions under which injunctive actions may be brought forward for acts contrary to the measures listed in its Annex which harm the collective interests of consumers.
76. Entities qualified to bring an action are any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the protection of the collective interests of consumer are respected, in particular:
- independent public bodies, specifically responsible for protecting the interests of consumers and/or
 - organisations whose purpose is to protect the interests of consumers
77. Member States must designate the courts or administrative authorities to rule on proceedings commenced by entities that are qualified to bring forward an injunctive action, and sets out certain conditions for their operation.
78. As regards the application of these principles to information society services, the Proposal for a Directive on certain legal aspects of electronic commerce in the Internal Market specifies that infringements to the national provisions incorporating Articles 5 to 15 of the proposed Directive (information obligations, commercial communications, electronic contracts, etc), will qualify as acts for which the mechanisms for injunctive relief established under Directive 98/27/EC may be used.

II.2. General Issues

79. The above sections cover the various stages of the business-to-consumer commercial relationship, covering the general consumer protection provisions that are applicable in each case. In addition, we believe it is appropriate to complete this overall picture with the relevant provisions on the protection of personal privacy, the law applicable to the contractual obligations as regards contracts with consumers and the principles governing jurisdiction on cases involving contracts with consumers.

A. *Privacy and data protection*

80. While the rights set out in European consumer protection legislation are aimed to protect the rights of individuals in their capacity as economic agents, the right to privacy is a fundamental right of individuals in their capacity as citizens. This right is recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as in the Universal Declaration of Human Rights.
81. The continuing development of information and telecommunication technologies makes it increasingly important to ensure that the level of protection of these fundamental rights is not undermined by the

⁴⁰ Official Journal L 166 , 11/06/1998 p. 0051 – 0055

⁴¹ COM(98) 586 final - Official Journal C 030 , 05/02/1999 p. 0004

transmission or processing of personal data in other countries. Data-processing systems are designed to serve man. They must respect their fundamental rights and freedoms, and contribute to economic and social progress, trade expansion and the well being of individuals;

82. In this respect the key provisions of Community law are set out in:

- *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*⁴²
- *Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector*⁴³

83. These Directives contain all the elements necessary for creating a comprehensive system of data privacy. They provide in particular that any processing of personal data must be lawful and fair to the individuals concerned. The data must be adequate, relevant and not excessive in relation to the purposes for which they are processed.

84. In order to be lawful, the processing of personal data must be carried out with the consent of the data subject or be necessary:

- for the conclusion or performance of a contract binding on the data subject,
- for the compliance with a legal requirement,
- for the performance of a task carried out in the public interest or in the exercise of official authority,
- in the legitimate interests of a natural or legal person, provided the interests or the rights and freedoms of the data subject are not overriding,
- in order to protect an interest which is vital for the data subject.

85. Data subjects enjoy a number of rights. In particular they have the right to obtain from the controller of the data, without constraint, at reasonable intervals and without excessive delay or expense:

- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,
- communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,
- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions
- as appropriate, the rectification, erasure or blocking of data the processing of which does not comply with the principles set out above, in particular because of the incomplete or inaccurate nature of the data.

The above rights are supported by judicial remedies including compensation for damages.

B. *The law applicable to contractual obligations*⁴⁴

86. This issue is governed by the:

*1980 Rome Convention on the law applicable to contractual obligations*⁴⁵.

⁴² Official Journal L 281 , 23/11/1995 p. 0031 – 0050

⁴³ Official Journal L 024 , 30/01/1998 p. 0001 - 0008

⁴⁴ Contractual obligations must be interpreted as including information on essential elements of the content of the contract, including consumer rights, (given to consumers before the conclusion of the contract) which have a determining influence on the decision to contract.

87. The basic principle is that parties have the freedom to choose the law that will govern a contract between them. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.
88. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, will not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of the law of the country which cannot be derogated from by contract. Such rules are also called 'mandatory rules'.
89. In the absence of a choice of law applicable to the contract, the contract will be governed by the law of the country with which it is most closely connected. Subject to the exceptions for certain types of contracts (including contracts concerning immovable property and carriage of goods, individual employment contracts and certain consumer contracts) it is presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.
90. As regards certain consumer contracts⁴⁶, namely contracts the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object, a choice of law made by the parties may not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence if:
- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
 - if the other party or his agent received the consumer's order in that country, or
 - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.
91. In the absence of choice of law, such consumer contracts will be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in the above paragraph.
92. It should be noted that in this respect also *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*⁴⁷ is relevant. Regardless of the question whether the criteria of the Rome Convention under which the consumer can not be deprived of the mandatory rules of the country of his habitual residence are fulfilled, a choice of law can constitute an unfair contract term within the meaning of Directive 93/13/EC, in particular where it excludes or hinders the consumer's right to take legal action or exercise any other legal remedy. In this respect we refer back to the section on 'Conclusion of the contract and contractual obligations'.

⁴⁵ Official Journal C 027 , 26/01/1998 p. 0034 – 0046 – It should be noted that certain contracts are excluded from the scope of the Convention (see Art.1 of the Convention).

⁴⁶ The principle that the consumer can not be deprived of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence does not apply to:

- a contract of carriage;
- a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

Unless it concerns a contract which, for an inclusive price, provides for a combination of travel and accommodation.

⁴⁷ Official Journal L 095 , 21/04/1993 p. 0029 - 0034

C. Jurisdiction

93. The principles governing jurisdiction and enforcement of judgments are set out in the:

*1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters*⁴⁸.

94. As regards jurisdiction over consumer contracts, the Brussels convention contains provisions which may be looked at in relation to the Rome Convention on the law applicable to contractual obligations. It stipulates that in proceedings concerning a contract concluded by a consumer, where in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and the consumer took in that State the steps necessary for the conclusion of the contract:

- a consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.
- proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

95. In its *Communication to the Council and the European Parliament - Towards greater efficiency in obtaining and enforcing judgements in the European Union*⁴⁹ the European Commission has proposed to remove the criterion that the consumer must have taken all necessary steps for the conclusion of the contract in his State on the basis of the argument that, as far as the consumer received the offer or the advertisement in his country of residence, the place of conclusion of the contract should be irrelevant. Discussions on this revision are still under way in the Council of Ministers.

96. At the global level, discussions are currently held in the framework of the Hague Conference aiming at the drafting of a convention on jurisdiction and the enforcement of judgements in civil and commercial matters. The Member States of the European Union, which are all members of the Hague conference, and the European Commission participate in these discussions. Jurisdiction over electronic contracts is among the topics to be addressed in the future convention.

⁴⁸ Official Journal C 027 , 26/01/1998 p. 0001 – 0027

⁴⁹ COM(97)609 final, Official Journal C 033 , 31/01/1998 p. 0003

Part III: Conclusion

97. This paper attempts to provide an overview of the general European Community provisions of consumer protection, which are applicable to electronic commerce. The overview is largely drawn on existing Community legislation, which has as its objective to facilitate the free movement of goods and services between the Member States of the European Union, while guaranteeing a high level of consumer protection. We believe that in order to facilitate trade between countries, it is necessary to co-ordinate the substantive provisions that govern the production, promotion, offer or sale of goods and services, including the consumer protection aspects. As electronic commerce offers unprecedented potential to facilitate the cross-border trade of goods and services on a global level, the co-ordination of the substantive provisions of law and policy at the global level must be pursued.
98. We fully appreciate that in view of the new realities brought about by electronic commerce it is necessary to assess whether existing principles are applicable and/or adapted to apply and enforce them effectively in the electronic commerce reality. We believe that the initiative undertaken by the FTC to call for comments is in fact part of such an assessment.
99. As regards the European Union, we would like to inform the FTC that the Council of Ministers, in its *Resolution on the Consumer Dimension of the Information Society*⁵⁰ expressed the view that a necessary condition for establishing consumer confidence and trust is the provision of an equivalent level of protection regarding the new technologies as is available in traditional consumer transactions by the application of existing principles of consumer policy to the new products and services available in the information society.
100. The Council invited the Commission to examine existing Community consumer-related legislation in the new circumstances arising from the information society, to identify possible loopholes in this legislation concerning specific problems in the context of the information society and to identify possible areas where additional regulatory action may be necessary.
101. In its Communication "Consumer Policy Action Plan 1999-2001"⁵¹ the proposal for a Directive on certain legal aspects of electronic commerce in the Internal Market the European Commission confirmed that it will carry out this assessment. If need be, the Commission will make specific additional proposals to resolve the deficiencies that will have been identified.

30/04/99

⁵⁰ Official Journal C 23, 28/01/1999 p. 0001-0003

⁵¹ COM(98)696 final