



Explanatory Report to the Convention on Information and Legal Co-operation concerning "Information Society Services" *

Moscow, 4.X.2001

The text of this explanatory report does not constitute an instrument providing an authoritative interpretation of the Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein. This Convention has been opened for signature in Moscow, on 4 October 2001, on the occasion of the 24th Conference of the European Ministers of Justice.

Commentary on the Articles of the Convention

Article 1 – Object and scope of application

1. In accordance with Article 1 the aim of this Convention is to set up a legal information and co-operation system in the area of new communication services following the example of Directive 98/48/EC. These new services, called "Information Society Services" are in fact activities of an interactive nature provided on-line ⁽¹⁾ which have an economic value.

2. These services are developing rapidly and raise a considerable number of cross-border legal issues in areas such as electronic signatures, the conclusion of on-line contracts, the fight against crime, the legal liability of operators, the protection of consumers and minors, etc. Moreover, they may have a direct impact on the protection of human rights and fundamental freedoms, such as the freedom of expression (Article 10 of the European Convention on Human Rights – hereinafter referred to as "the ECHR") and the right to respect for private life (Article 8 of the ECHR).

(*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

(1) «Information Society Services» cover a wide range of on-line activities amongst which : on-line information services (newspapers, magazines, libraries, electronic databases, research engines etc.); electronic commerce; on-line agencies (of advertising, marketing, tele-shopping, tourism, real estate, etc.); professional services provided by electronic means (by consultants, translators, designers, computer experts, etc.); on-line validation services (certification of electronic signatures, authentication, recording, dating, etc.); on-line services to consumers (interactive teleshopping, information on products and assets, purchase tests, research and evaluation of promotional offers); on-line tourist services (information; flight, train, hotel, car, show reservations; virtual visits to museums, monuments and sites); on-line entertainment services; new telecommunications services on demand (videoconference, Internet access, electronic mail, discussion forums), etc.

3. This Convention, which has been drafted in the spirit of and in correspondence with the scope of the Directive EC/98/34 (as modified by Directive EC/98/48), will enable the Council of Europe, its member States and the European Commission to co-operate in the rapidly evolving field of "Information Society Services". It is clear that European Community legislation and international law need to evolve in this context as far as possible together and to this end, the two legal instruments need to have similar legal scope. As directives are binding legal instruments within the European Community legal order as far as the objectives are concerned, a convention-type binding international legal instrument appears to be the most appropriate Council of Europe instrument from an international law point of view.

4. The object and aim of the exclusions provided in paragraphs 2 and 3 of Article 1 are to ensure the correspondence of the scope of application of the present Convention with that of Directive EC/98/34 (as modified by Directive EC/98/48), as set out by its Articles 1 and 10, in order to prevent any problem of co-ordination between these two complementary instruments.

5. In particular, paragraph 2 excludes from the scope of application of this Convention domestic regulations by means of which a Party complies with a binding act of European Community legislation or makes use of the other possibilities set out in Article 10 of the Directive 98/34/EC or complies with an obligation of notification under another international agreement.

6. Paragraph 3 specifies the following fields as being completely excluded from the scope of application of the present Convention:

- a. radio broadcasting services;
- b. television programme services covered by the European Convention on Transfrontier Television;
- c. matters within the field of telecommunications services and financial services which are covered by European Community legislation or international agreements.

Article 2 – Definitions

7. The definition of "Information Society Services" contained in paragraph 1 of Article 2 is the same as the definition of such services in the Directive on Regulatory Transparency 98/48/EC as between the member States of the European Community.

8. For the purposes of this definition:

- "at a distance" means that the service is provided without the parties being simultaneously and physically present,
- "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
- "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request. Unsolicited services, meaning services provided without being individually requested, are therefore not covered.

9. These three basic criteria should be cumulatively met for a service to be considered as an "Information Society Service".

10. Moreover, "Information Society Services" falling within the scope of the Convention are normally provided for remuneration. This conforms with the case-law of the European Court of Justice when interpreting Article 50 (formerly Article 60) of the EC Treaty.

11. The definition excludes all services which are not offered at a distance nor via electronic means nor supplied on individual demand, such as services provided in the physical presence of the provider and the recipient, services that do not use electronic processing/inventory systems or services which are transmitted on a point to multipoint basis.

12. The only draft domestic regulations which must be transmitted are those specifically aimed at the conditions relating to the taking-up and pursuit of Information Society Services activities : they can concern the service provider of such activities, the services as such or their recipients. These are draft domestic regulations which are elaborated at all levels – federal, regional and local – according to the characteristics of the legal system of each Party.

Article 3 – Receiving and transmitting authorities

13. Under the terms of Article 3, each Party must designate a transmitting authority and a receiving authority. As far as member States of the European Community and European Economic Area are concerned, such authorities already exist and are operational in the field of "Information Society Services" under Directive 98/48/EC and could, therefore, be given the same operational function in the context of this Convention.

Article 4 – Procedure

14. Pursuant to the initial notification procedure contained in Article 4, paragraph 1, each Party shall transmit the text and a short summary which could be one or two pages long of any draft domestic regulation aimed specifically at "Information Society Services" to the Secretary General of the Council of Europe when the draft is at a stage of preparation whereby it is, in any event, still possible to change the substance of the draft - otherwise the preliminary notification would be without practical effect.

15. In accordance with Article 4, paragraph 1, a Party is required to follow this procedure if substantial revisions are made to the draft domestic regulation which have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

16. It is important that each Party transmit these texts and summaries, where practicable by electronic means, to ensure that the system of exchange of draft domestic regulations is carried out quickly and easily.

17. The transmission of a short summary of the text of any draft domestic provision in English or French will enable the recipient authorities to decide whether they wish to examine the original text in detail. The Party transmitting the text and a short summary of any draft domestic regulation, may also indicate that it will accept observations from any other Party in different languages and indicate which are these languages.

18. Under paragraph 3 of Article 4, when Parties receive such texts and summaries they may, if they wish, send written comments to the Party concerned. Such comments must be in English or in French. If Parties decide to submit comments, it is in their interest to do so as soon as possible because, unlike EC Directive 98/34, there is no "standstill" period during which the legislative process is frozen.

19. Notwithstanding the absence of a standstill period, the Parties for the purposes of this Convention are invited, when preparing and finalising new domestic regulations, to take account as far as possible of any observations by the other Parties.

20. Paragraph 5 of Article 4 allows Parties to legislate without complying with the procedure described in paragraphs 1 to 3, if rules need to be implemented urgently. Like Directive 98/34/EC, the text of the Convention provides a. a general urgency clause and b. a specific clause relating to urgent matters in the field of financial services.

21. Article 4 paragraph 6 requires each Party to transmit the definitive text of a domestic regulation to the Secretary General of the Council of Europe once it has been finalised. They should do so as soon as possible and where practicable by electronic means. This requirement applies to all regulations adopted by Parties to this Convention, including those which were not previously notified to the Secretary General due to urgency. The purpose is to enable a database of legislation on "Information Society Services" to be maintained.

22. In Article 4 paragraph 7 the Convention requires the collation of the finally adopted texts of the domestic regulations so that they may be stocked in a single database within the Council of Europe and made available, where practicable, by electronic means, in particular by accessing a Council of Europe Internet web site.

Articles 5-13 – Final clauses

23. In the light of Article 6 paragraph 1, the member States of the European Community and of the Economic European Area do not apply the present instrument in their mutual relations concerning matters governed by this Convention.

24. In accordance with Article 6 paragraph 2, the European Community, in pursuance of the provisions of paragraph 1 of Article 4, shall equally fulfil the obligation to notify the texts transmitted to it by its member States.

25. As a consequence, the drafts already initiated by the member States of the European Community are to be submitted to the Secretary General through the European Commission. This practice allows each national point of contact currently operating within the framework of Directive 98/48/EC to continue to make one single notification (through the European Commission, who then transmits the draft to the Secretary General of the Council of Europe) in accordance with the Directive. Moreover, the national receiving authorities of these States will receive, through the European Commission, the texts sent by the Council of Europe originating from the Parties other than the member States of the Economic European Area and may submit observations to the European Commission, so as to enable it to transmit them, under paragraph 3 of Article 4, to the Secretary General of the Council of Europe. This means in practice that the central authorities and the procedures already established by the European Community Directive will be used in the framework of this Convention.

26. The Convention will come into force after five signatories have expressed their consent to be bound. Council of Europe member States, the non-member States which have participated in its elaboration (Bosnia and Herzegovina, Holy See, Canada, Japan, United States of America, Mexico) and the European Community may be signatories.

27. In accordance with Article 7 (Amendments to Article 1 of the Convention concerning excluded matters), the Parties may whenever necessary propose to change the matters to be excluded from the scope of application of this Convention, in order in particular to keep the correspondence between the scope of application of the present Convention with Directive EC/98/34 (as modified by Directive EC/98/48). The text of Article 7 is inspired by a similar provision contained in the Convention on Civil Liability for damage resulting from activities dangerous to the environment (ETS No. 150).

28. Paragraph 1 of Article 7 makes it clear that only Parties to the Convention may propose amendments to paragraph 3 of Article 1 concerning excluded matters.

29. Paragraph 2 of Article 7 provides that, as soon as a proposed amendment has been received, the Parties may adopt it by a two-third majority of the votes cast. For operational reasons, the meetings of the Parties will take place on the occasion of the European Committee on legal Co-operation (CDCJ)

30. Paragraph 3 of Article 7 deals with the entry into force of the proposed amendment. This paragraph makes it clear that, if the Parties have notified an objection to the proposed amendment by more than one-third of the votes cast, the latter will not come into force. Moreover, this paragraph provides that, if there is no objection by one-third of the votes cast by the Parties, the proposed amendment shall enter into force for those Parties which have not notified any objection. This means that the amendment will not apply to those Parties which have notified an objection and that, in conformity with the principle of reciprocity provided by the 1969 Vienna Convention on the Law of Treaties, the Parties which have accepted the amendment will not apply it in respect of those Parties which have notified an objection.

31. In addition in accordance with Article 9, the Committee of Ministers may, on its own initiative or upon request, and after consulting the Parties which are not represented in the Committee of Ministers, invite any non-member State, which has not participated in the elaboration of the Convention, to accede to the present Convention.