



EUROPEAN COMMISSION

DIRECTORATE-GENERAL III - INDUSTRY

Regulatory Policy and Standardisation, Electronic Commerce, Telematics Networks

DIRECTORATE-GENERAL XV - INTERNAL MARKET AND FINANCIAL SERVICES

Intellectual and Industrial Property. Freedom of establishment and freedom to provide services,
notably in the regulated professions; the media

The media, commercial communication and unfair competition

Brussels,

**Standards and Technical
Regulations Committee
Doc. S-42/98 - EN (def.)**

VADE-MECUM **TO DIRECTIVE 98/48/EC***

WHICH INTRODUCES A MECHANISM FOR THE TRANSPARENCY OF **REGULATIONS ON INFORMATION SOCIETY SERVICES**

(*DIRECTIVE 98/48/EC AMENDING DIRECTIVE 98/34/EC LAYING DOWN A
PROCEDURE FOR THE PROVISION OF INFORMATION IN THE FIELD OF
TECHNICAL STANDARDS AND REGULATIONS)

CONTENTS

PREFACE

INTRODUCTION

OBJECTIVES OF THE DIRECTIVE

- (a) *To provide appropriate information on a wide scale*
- (b) *To prevent the creation of fresh obstacles and the refragmentation of the internal market*
- (c) *To reduce disputes to a minimum*
- (d) *To avoid the risks of over-regulation*
- (e) *To protect general interests more effectively and to identify any need for rules quickly*
- (f) *To step up administrative cooperation*
- (g) *To strengthen Community participation in international discussions*

CHAPTER 1

SCOPE

(SERIES OF "TESTS" TO BE CARRIED OUT ON A NATIONAL DRAFT TO SEE WHETHER IT NEEDS TO BE NOTIFIED OR NOT)

- 1.1 **Is it a "regulation" on services?**
- 1.2 **Does the regulation concern an "Information society service"?**
 - 1.2.1. *Is there a "service" in accordance with Community law?*
 - 1.2.2. *Is there an "Information society service" (in accordance with the Directive)?*
 - (a) *Is the service supplied "at a distance"?*
 - (b) *Is the service supplied "electronically"?*
 - (c) *Is the service supplied "at the individual request of the recipient"?*
- 1.3 **Is the regulation aimed "specifically" at an information society service?**
- 1.4 **Does the regulation come under one of the heads excluded by the Directive?
(Categories of rules relating specifically to information society services which do not
need to be notified)**

- 1.4.1. *Does the regulation come under one of the exemptions provided for by Article 10 of the Directive (relating in particular to draft implementing measures)?*
- 1.4.2 *Does the regulation concern matters which are the subject of Community arrangements for telecommunications services?*
- 1.4.3 *Does the regulation concern matters which are the subject of Community arrangements for financial services?*
- 1.4.4. *Does the regulation relate to regulated markets (stock exchanges) or other financial markets or bodies (partial exemption)?*
- 1.5 Can the regulation notified (at the draft stage) be adopted immediately in national law?
(Assumption of prior notification but without "standstill" period)
- 1.5.1 *Is the regulation linked to tax or financial measures?*
- 1.5.2 *Urgency clause*

CHAPTER 2

FUNCTIONING OF THE DIRECTIVE

- 2.1 Procedures
- 2.1.1 *First stage (automatic, involving a standstill period of 3 months)*
- 2.1.2 *Possible second stage which may involve an extension of the standstill period beyond 3 months*
- (a) *no reaction*
- (b) *observations*
- (c) *detailed opinion(s)*
- (d) *possible establishment of the existence of a proposal for a Community instrument in the field*
- 2.1.3 *Renotification of a draft that has already been notified*
- 2.1.4 *Non-notification at the draft stage of a rule relating to services*
- 2.2 Committee

CHAPTER 3

ROLE OF THE INTERESTS CONCERNED

- 3.1. *Access by representative bodies, firms and individuals to information*
- 3.2. *Consultation of, and possible reactions from, the interests concerned*

CHAPTER 4

IMPLEMENTATION OF THE DIRECTIVE

- 4.1. *Timetable and arrangements for transposal*
- 4.2. *Preparation of the lists of designated national authorities*
- 4.3. *Reports on implementation of the Directive*
- 4.4. *Clause concerning the possible revision of the Directive*
- 4.5. *Reference to Directive 98/34/EC in national rules*

PREFACE

Information society services - defined as services supplied at a distance, by electronic means and at the individual request of a recipient of services, see Chapter 2 - are not just a major feature of today's economic and social reality.

Above all, they offer enormous potential for investment, growth and the competitiveness of European industry, for job creation, for enhancing the diversity and identity of Europe and for the choices and practical applications available to consumers.

Whether all these opportunities associated with on-line services - which, by their very nature, are supplied and received without regard to barriers and geographical distances - are actually seized depends on the preservation of the frontier-free area which is the internal market.

To safeguard and promote the development of interactive services, it is essential (a) that operators can rely on a lasting prospect of an easily accessible, large, frontier-free market in which they can make massive investment and achieve economies of scale and (b) that competent national authorities, firms and users should have a reliable, stable and consistent legal framework which is LAUBAG's based on transparency, mutual confidence and dialogue at cross-border level.

Directive 98/48/EC,¹ adopted on 20 July 1998, seeks to provide a stable, transparent and consistent framework by applying to future national legislative initiatives specifically concerning information society services the information and consultation system between the Commission and the Member States already in place and already used successfully under Directive 98/34/EC.²

If Directive 98/48/EC is to contribute to the achievement of a frontier-free area based on the principles of the internal market (in particular the free movement of services and the freedom of establishment) and thereby stimulate the development of new services, it must become an integral part of the ordinary activity of the national administrations concerned and must be applied consistently, correctly and uniformly by them.

The Directive's successful operation and the achievement of its objectives to everybody's satisfaction depend essentially on the spirit of cooperation and mutual goodwill among national authorities, and between these and the Community administration.

This Vade-mecum seeks, therefore, to facilitate the task of the various national authorities whose job it is to notify and examine national draft rules relating to information society services.

Given that the transparency of rules is the declared objective, the Vade-mecum is also being made available to operators and users affected by Directive 98/48/EC and wishing to make their contribution as regards its operation.

¹ Parliament and Council Directive 98/48/EC of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 217, 5.8.1998, p. 18).

² Directive 98/34/EC, consolidating the old Directive 83/189/EEC as amended principally by Directives 88/182/EEC and 94/10/EC (OJ L 204, 21.7.1998, p. 37).

- *Structure of the Vade-mecum*

Without claiming to be exhaustive, the Vade-mecum, after rapidly running through the objectives pursued (Introduction), seeks to identify, explain and clarify the essential questions for effective and consistent application of the Directive, namely its scope (the draft rules which must be notified and those which, on the contrary, are not covered by Directive 98/48/EC – Chapter 1), its operation (Chapter 2), the role of the interests concerned (Chapter 3) and its implementation (Chapter 4).

- *Reference to other documents explaining Directive 98/34/EC*

It should be remembered that, as the Directive on information society services only reproduces the provisions of Directive 98/34/EC on products, applying them to the field of information society services and supplementing them where necessary, reference will also have to be made to those provisions. It is appropriate, in addition, to refer to the explanatory documents concerning the interpretation and application of Directive 98/34/EC, already drawn up by the Commission.³

These documents were drafted with reference to Directive 83/189/EEC (as successively amended by Directives 88/182/EEC et 94/10/EC) and of course remain perfectly valid as far as Directive 98/34/EC, which consolidated and repealed the preceding Directives, is concerned. They constitute working aids which should be consulted in order to obtain further information and clarification to that in the present Vade-mecum: they provide general indications and explanations about the operation of the basic Directive and its fundamental concepts which are also valid, at least to some extent, for the new part on services.

³ These consist of the "Vade-mecum to the operation of the information procedure for technical regulations" of 8 June 1995 and the brochure entitled "Comments on Directive 83/189/EEC - Guide to information procedures for national technical standards and regulations", published in 1998.

INTRODUCTION

OBJECTIVES OF THE DIRECTIVE

(a) To provide appropriate information on a wide scale

Directive 98/48/EC is above all designed to provide authorities, operators and users affected by information society services with correct, preventive information about draft regulations which may affect their fields of competence and action.

The mechanism introduced by the Directive may therefore constitute a source of general information, crucial to determining the respective attitudes and decisions of the various players.

(b) To prevent the creation of fresh obstacles and the refragmentation of the internal market

The future preparation of new national regulations relating to information society services (e.g. on the protection of minors, consumer protection, cultural and linguistic requirements, administrative controls, the criminal justice system, and the conditions for the on-line pursuit of regulated professions) may lead to the appearance of different or even mutually divergent solutions.

This could be the result of a series of factors such as: disparities in the development of national markets (one national economy may be more receptive than others to a type of on-line activity); divergences in the legal regimes applicable (ex-ante control, e.g. through licensing, or ex-post control); cultural and social traditions and characteristics specific to each country; diversity of the services involved and, hence, of the vast range of legal fields concerned; etc.

Without limiting the national regulatory power to protect general interests or, still less, the legitimacy of certain differences, the Directive simply seeks to make it possible to exchange information and hold a direct, far-reaching dialogue on this subject so as to prevent the various national initiatives on the "new" services from producing new legal boundaries and unjustified or disproportionate obstacles to the free movement of services or the freedom of establishment, thereby leading to a refragmentation of the internal market.

(c) To reduce disputes to a minimum

As an alternative to infringement proceedings based on Article 169 of the Treaty, which are characterised by their adversarial nature and are initiated in principle only after a national measure has come into force and is already producing its effects (with all the delays and difficulties that this involves), the Directive makes it possible to seek the solution to any problems and incompatibilities between national measures and the principles of the internal market through a more flexible, less conflictual and more rapidly operational system of prior consultation.

(d) To avoid the risks of over-regulation

Without a mechanism for transparency and control, the adoption of a national measure would be likely to trigger a series of subsequent initiatives by the other Member States

which, later, could require action by the Community in order to ensure freedom of movement while safeguarding minimum uniform protection on Community territory.

Like Directive 98/34/EC, the operation of the new Directive 98/48/EC is designed to avoid such a regulatory spiral and the adoption of measures which could prove premature in the case of services about whose form, nature and future development not enough is yet known.

Basically, it will be necessary to resort to new Community arrangements only where national measures have restrictive effects on the freedoms in the Treaty which cannot be resolved by directly applying the Treaty, in particular the principle of mutual recognition, or by existing secondary law.

(e) To protect general interests more effectively and to identify any need for rules quickly

The Directive is supposed to make it possible to concentrate on genuine regulatory needs and rapidly to identify those situations where national restrictions are justified on grounds of general interest such as: the protection of minors and consumers, of codes of conduct, of legal certainty and the fairness of transactions, and of industrial and intellectual property rights, etc.

The concerns which prompt a Member State to regulate may be shared by other Member States and may sometimes be more effectively allayed by protection at Community level. This aspect is fundamental in the context of the information society, given the characteristics of the technological environment and, in particular, the possibility of circumventing protective measures drawn up by one Member State alone, the problems of deciding which law applies to suppliers and services, the identification of liable parties, and the difficulties associated with effective application of the rules or with the prevention of crime, and so on.

In all these scenarios, the mechanism of transparency and control identifies the needs for harmonisation more rapidly and with better knowledge of the facts.

(f) To step up administrative cooperation

The mechanism for exchanging information between Member States at the draft regulation stage enables national legislators to learn about the current situation in other Member States, and thus to become aware of the risk to both the internal market and the effective protection of public-interest objectives.

The transparency mechanism is therefore a particularly effective aid to administrative cooperation, which may lead to a genuine collective European response.

(g) To strengthen the Community's position in international discussions

It is also essential to determine an information and consultation framework for preserving the stability and cohesion of Community law, if the Community is to participate consistently and effectively in discussion of regulatory matters concerning information society services in the context of international cooperation and negotiations.

For the same reasons as those set out above, the inherently cross-border nature of on-line services also calls for an information and cooperation effort in a wider context than the European Union. Directive 98/48/EC could thus constitute the model, for instance, for a similar legal instrument for prior consultation between national authorities at international level.

CHAPTER 1

SCOPE

(SERIES OF "TESTS" TO BE CARRIED OUT ON A NATIONAL DRAFT TO SEE WHETHER IT NEEDS TO BE NOTIFIED OR NOT)

The scope of the new Directive 98/48/EC on information society services is defined by the new points 2, 5, 11 and 12 added to Article 1⁴ of Directive 98/34/EC.

⁴ Article 1

For the purposes of this Directive,

...

'2. "service", means any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- "at a distance" means that the service is provided without the parties being simultaneously 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.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

- radio broadcasting services,
- television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC.¹

...

'5. "rule on services" means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

This Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of telecommunications services, as defined by Directive 90/387/EEC.¹

This Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of financial services, as listed non-exhaustively in Annex VI to this Directive.

With the exception of Article 8(3), this Directive shall not apply to rules enacted by or for regulated markets within the meaning of Directive 93/22/EEC or by or for other markets or bodies carrying out clearing or settlement functions for those markets.

For the purposes of this definition:

- a rule shall be considered to be specifically aimed at information society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,
- a rule shall not be considered to be specifically aimed at information society services if it affects such services only in an implicit or incidental manner.

...

11. "technical regulation" means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, 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. (...)

...

More precisely, points 2 and 5 introduce additional definitions (of "services" and "rule on services" respectively) specific to these services, while points 11 and 12 merely extend to the new field of information society services concepts (such as "technical regulation" and "draft technical regulation") already in force with regard to products.

It is important first of all to emphasise that the obligation to notify in advance, i.e. to communicate a rule to the Commission at the draft stage, concerns a very precise category of national measures: national rules aimed specifically at information society services. However, it does not concern all national regulations affecting information society services in one way or another. In particular, regulations which affect these services indirectly or are not specifically aimed at them are not concerned.

To determine whether a national draft instrument should or should not be notified, a number of checks must be made, on the basis of positive criteria (defining the areas covered) and negative criteria (identifying the areas exempted), laid down partly by the basic Directive (98/34/EC) and partly by Directive 98/48/EC.

In other words, for a national draft to be subject to prior notification it must meet the definitions in the Directive and, at the same time, must not fall within one of the exempted categories.

The basic Directive 98/34/EC defines the general criteria applying to all draft technical regulations (relating to both products and services). These general criteria concern:

- the fundamental concept of a "technical regulation" (Article 1, new point 11); obviously, in the specific context of Directive 98/48/EC, this concept must relate to services and not products;
- the exception from the obligation to notify certain measures specified in Article 10, in particular since they are subject to control in another context, such as for example measures implementing Community directives.

Directive 98/48/EC, however, introduces new specific criteria on rules relating to information society services.

The new criteria extend the scope of the Directive to draft national regulations which, while respecting the above-mentioned general criteria, relate specifically to information society services.

Under the new Directive 98/48/EC, draft technical "regulations" which do not qualify for the exemption provided for in Article 10 of Directive 98/34/EC must be notified where:

- they relate specifically to information society services and
- do not fall within one of the specific exemption categories provided for by Directive 98/48/EC.

12. "draft technical regulation" means 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.

All these concepts can be arranged systematically: for a national instrument to be considered a draft national regulation relating to information society services, and hence subject to the obligation of prior notification, it has to be subjected to the following four "test questions":

1. Is it a "**rule on services**"?
2. Does the rule concern an "**information society service**"?
3. Is the regulation aimed "**specifically**" at an information society service?
4. Does the regulation come under one of the **categories exempted** by the Directive: i.e. the **general exemption** already provided for by Article 10 of Directive 98/34/EC (which concerns national **implementing measures** in particular), or one of the **specific exemptions** in the field of services introduced by the new Directive 98/48/EC?

The four tests - some of which are positive and some negative - are cumulative: they must all be satisfied, one after the other, in order to establish whether ultimately, for the purposes of the Directive, there is still an obligation on the Member State to notify the draft national regulation.

It is important to emphasise that the obligation to notify a national instrument in advance does not mean in all cases that the adoption of the instrument is postponed. The Directive provides that, where the rule is linked to fiscal or financial measures or where certain exceptional urgent circumstances exist, a Member State may definitively adopt a national measure immediately, once it has notified it.

The string of test questions is explained in the following paragraphs.

1.1 Is it a "rule on services"?

Article 1, new point 5 defines the concept of a "rule on services" as a "requirement of a general nature" relating to the taking-up and pursuit of service activities and, in particular, to the service provider or the recipient of services (the parties) or the service as such (the service).

Recital 18 of Directive 98/48/EC cites, as an example, rules on the establishment of service providers, in particular those on authorisation or licensing arrangements.

The general concept of a "technical regulation" derives from Directive 98/34/EC (Article 1, new point 11) and, as in the case of products, is not aimed at all national measures but only instruments having general regulatory scope.

Excluded therefore from this definition of a "rule on services" (and not covered by the Directive) are those measures which, instead of laying down abstract and general requirements, are "of direct and individual concern to certain specific recipients" (see recital 18), e.g. administrative or judicial decisions in individual cases. Thus recital 18 cites, as an example of a measure other than a technical regulation, the granting of telecommunications licences to one or more specific operators.

Similarly, private-law acts or agreements concluded by natural and/or legal persons and to which the Member States are not a party are not covered by the Directive. The last clause of recital 5 cites as an example agreements governed by private law between credit institutions.

Other important elements which should be taken into account in interpreting the concept of a rule on services are comprised in Article 1, point 11 - in particular with regard to de facto technical regulations, which are covered by the concept of a technical regulation and must consequently be notified in advance.

The concept of a de facto technical regulation covers in particular: national provisions which refer to other rules on services and to professional codes or codes of good conduct,⁵ compliance with which confers a presumption of conformity; voluntary agreements to which a public authority is a contracting party; and rules on services linked to fiscal or financial measures (which must be notified, but without being subject to a standstill period).

- *Examples of measures likely to constitute a rule on information society services*

- Measures concerning the conditions for taking up an activity:

Draft law establishing the legal arrangements governing the issue of electronic money: conditions concerning professional qualifications and good repute, financial guarantees, obligation to obtain a licence and arrangements for its issue, etc.

- Measures concerning the conditions for pursuing an on-line activity:

Draft decree concerning the procedures for practice as an on-line lawyer: ban on practising as a company; incompatibility of the profession with other activities; compulsory scales of fees; general ban on commercial promotion or certain forms of advertising, etc.

- Measures concerning the provider of on-line services:

Draft regulation concerning the activity of on-line tax consultant: professional experience required, special registration procedures, requirements as to good repute and financial guarantees, etc.

- Measures concerning the supply of on-line services:

Draft law concerning the procedures inherent in the supply of on-line architect services: obligatory clauses in contractual relations, scales of fees, ban on promotional offers, etc.

- Measures concerning the recipient of on-line services:

Draft regulation on participation in certain games of chance on the Internet: possibility of, or facility for, participation determined in the light of certain criteria (age, residence); ban on participation in unauthorised schemes, etc.

- Examples of mandatory de facto rules on services:

Concerning on-line translation activities: a regulation referring to non-regulatory instruments or to a code of professional conduct regarding the supply of on-line services, compliance with which confers a presumption of conformity; a voluntary agreement to which a public authority is a contracting party and which is designed to ensure compliance with rules on services; a ministerial decree laying down the tax arrangements designed to

⁵ It should be emphasised that codes of good conduct and self-regulation codes are not covered by the concept of a technical "regulation" (and need not therefore be notified in advance), unless the Member State is a contracting party to them or they are referred to in a national provision: in the latter case, as well as the national provision, the code itself will have to be notified (or, if it is already in existence, transmitted) to the Commission so that a complete assessment of the draft national regulation can be made.

encourage compliance with certain rules on services (in the latter case, there is no standstill period following notification), etc.

- *Examples of instruments not constituting a rule on services*

- a licence for, or a refusal to grant a licence to, one or more individual operators,
- a fine imposed on a firm,
- a survey or a study launched by a national supervisory authority,
- a judgment by a court, tribunal or magistrate,
- a private-law agreement to which the State is not a contracting party.

1.2 Does the rule concern an "information society service"?

To determine whether an activity may be regarded as an information society service, the following two, cumulative questions must be answered in the affirmative:

- (i) first, is the activity in question a "service" in Community law ?
- (ii) second, is the "service", in the terms of the Directive, an "information society service", i.e. is it simultaneously supplied (a)"at a distance", (b)"by electronic means" and (c)"at the request of a recipient" ?

1.2.1. *Is there a "service" in accordance with Community law?*

Before defining the concept, specific to Directive 98/48/EC, of an "information society service", it is necessary to recall briefly the meaning of the general concept of a "service" given in the Treaty of Rome.

As stated in recital 19 of the Directive, "under Article 60 of the Treaty as interpreted by the case-law of the Court of Justice, 'services` means those normally provided for remuneration".

The Court of Justice explained in *Wirth* (Case C-109/92 [1993] I-6447, paragraph 15) that "the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question".

In the interests of clarification, the same recital 19 adds "whereas that characteristic is absent in the case of activities which a State carries out without economic consideration in the context of its duties in particular in the social, cultural, educational and judicial fields; whereas national provisions concerning such activities are not covered by the definition given in Article 60 of the Treaty and therefore do not fall within the scope of this Directive" (see *Wirth*, cited above).

Thus, for instance, services supplied by the State with regard to compulsory schooling or hospital care, the issuing of certificates and documents by government offices (ministry, local authority, land register, etc.), measures relating to national defence, civil protection or the maintenance of law and order, or the activities associated with the exercise of civil, criminal, administrative and tax justice, etc. are excluded. In such contexts, any sums of money paid by the individual are not, in the proper sense, an economic consideration for

the activity carried out by the State, on the pattern of a purely economic service available on the market.

It is, however, important to supplement these elements with the statement of the Court's⁶ concerning the need not to interpret the concept of services restrictively, since "Article 60 does not require the service to be paid for by those for whom it is performed". The consideration, therefore, may exist independently of the direct or indirect arrangements for financing a service:⁷ accordingly, activities financed entirely by advertising are remunerated and therefore constitute services.

In short, any economic activity - not governed by the provisions of the Treaty concerning the free movement of goods, capital and persons - may constitute a "service" for the purposes of Article 60 and is therefore likely to come under the definition provided for in Article 1 of the Directive. Only activities performed without economic consideration by the State as part of its function in the social, cultural, educational, administrative and judicial fields are in principle excluded.

1.2.2. Is there an "information society service" in accordance with the Directive?

A clear understanding of the novel concept of information society services can be obtained from both the substantive provisions and certain recitals of Directive 98/48/EC, which provide useful definitions and pointers. A few additional explanations should be given.

The basic definition of "information society service" is given in Article 1, new point 2 as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

The three features which together characterise the new category of information society services are therefore:

- (a) supply at a distance;
- (b) supply by electronic means; and
- (c) supply at the individual request of a recipient of services.

The combination of these three features differentiates information society services from all other economic activity. However, if only one of these features is missing from a supply of services, that activity cannot be considered as an information society service. An indicative list of services not covered is to be found for this reason in Annex V to Directive 98/48/EC (examples of services not covered are given in the following pages).

(a) Is the service supplied "at a distance"?

⁶ Case C-352/85 *Bond van Adverteerders* [1988] ECR 2085.

⁷ For examples of consideration not paid by the recipient, see *Bond van Adverteerders*: the Court cites the situation of cable operators who provide a service for television broadcasters but are remunerated from the fee paid by subscribers and of broadcasters who are paid by advertisers for disseminating their messages to the public.

In accordance with the subdefinition contained in the first indent of the second subparagraph of Article 1, new point 2, the phrase "at a distance" means: a "service provided without the parties being simultaneously present".

Such a concept is not new. Its wording echoes the Distance Selling Directive.⁸

The concept "at a distance" relates to situations where the service is supplied via remote communication techniques characterised by the fact that the parties (i.e. the provider of the service and the recipient) are not physically present simultaneously.

- *Examples of services supplied at a distance (covered):*
 - *general on-line information services: electronic newspapers and magazines; electronic libraries; databases; information on current events, weather news, traffic information, local news, environmental information; information searches (search engines); computer graphics; etc.;*
 - *educational on-line services supplied to students at home from private education centres: interactive courses, virtual universities and schools, guidance services for students and families, etc.;*
 - *remote surveillance activities: remote health checks or on-line surveillance of private dwellings or business premises from surveillance centres;*
 - *on-line consumer services: interactive teleshopping, information on, and assessments of, products and services, searches for bargains, etc.*
- *Examples of services not supplied at a distance (not covered; see Annex V to Directive 98/48/EC):*
 - *medical examinations or treatment at a doctor's surgery using electronic equipment where the patient is physically present;*
 - *consultation of an electronic catalogue in a shop with the customer on site;*
 - *reservation of a plane ticket through a computer at a travel agency in the physical presence of the customer (the service supplied by the travel agency to the customer not being "at a distance");*
 - *electronic games made available in a video-arcade where the customer is physically present.*

(b) *Is the service supplied "by electronic means"?*

In accordance with the second indent of the second subparagraph of Article 1, new point 2, the expression "by electronic means" signifies: a "service 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".

Through this definition, the Directive is intended to cover services whose component parts are transmitted, conveyed and received within an electronic network. The service must be conveyed from its point of departure to its point of arrival:

⁸ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

- by means of electronic (processing and storage) equipment and
- through telecommunications channels (the reference to wire, radio, optical means and other electromagnetic means appears in Article 2(3) of Directive 90/387/EEC,⁹ as amended by Directive 97/51/EC¹⁰).
- *Examples of services supplied by electronic means*
 - *on-line entertainments offered on the Internet: video games on demand; music on demand; video on demand; sports events on demand; lotteries, betting and gaming; virtual tours of archaeological sites, monuments and museums; etc.;*
 - *services for accessing the Internet and the World Wide Web: electronic mail, discussion forums, file transfer, chat conferencing;*
 - *on-line validation services: authentication, registration, dating and verification services (acknowledgement of receipt, check on the simultaneity of supply and consideration, etc.), electronic stamps, etc.;*
 - *on-line telecommunications services (see also point 1.4.2.): videotelephony, videoconference, telephony and facsimile services involving the processing and storage of data, etc.;*
- *Examples of services not provided by electronic means (not covered; see Annex V to Directive 98/48/EC):*
 - *services having material content even though provided via electronic devices: automatic teller machines; access to road networks and car parks, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment;*
 - *off-line services: distribution of CD-ROMS or software on diskettes;*
 - *services which are not provided via electronic data storage and processing systems: voice telephony and facsimile services supplied by traditional means (in real time).*

(c) Is the service supplied "at the individual request of the recipient"?

In accordance with the subdefinition in the third indent of the second subparagraph of Article 1, new point 2, the expression "at the individual request of a recipient of services" means: "a service provided through the transmission of data on individual request".

The services covered by this definition, therefore, are those which are provided in response to the individual request of their recipient.

This interactive feature characterises information society services and distinguishes them from other services, which being distributed without the need for a request from the recipient are not covered by the Directive.

This is why Article 1 states that the Directive does not apply to:

⁹ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ L 192, 24.7.1990, p. 1).

¹⁰ Parliament and Council Directive 97/51/EC of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications (OJ L 295, 29.10.1997, p. 23).

- radio broadcasting services,
- television broadcasting services covered by Article 1(a) of Directive 89/552/EEC as last amended by Directive 97/36/EC (the Television without Frontiers Directive). The last sentence of Article 1(a) stipulates that "communication services providing items of information or other messages on individual demand ..." are not included.
- *Examples of services supplied on individual request (covered):*
 - *on-line tourist services: booking of flights, trains and hotels; booking tickets for museums and theatres; tourist information; hire-car reservations, etc.;*
 - *on-line services offered to firms: information, management and assistance with regard to supplies, inventory, dispatch, contracts, accounts, etc.;*
 - *on-line agency services: estate, advertising, marketing, public relations, and employment agencies, marriage bureaux, auctioneers, etc.;*
 - *on-line professional services: of lawyers, consultants, tax advisers, accountants, translators, computer scientists and software designers, engineers, designers, couturiers, psychologists, doctors (computer medicine), etc., consisting of services such as access to databases, data and file management, consultation, diagnosis, preparation of plans, projects and designs, personalised search and selection of information, addresses and job offers, etc.;*
 - *on-line financial services: insurance and banking services (especially telebanking and electronic payment), investment and stockbroking services (see also points 1.4.3. and 1.4.4.).*
- *Examples of services not supplied on individual request (not covered; see Annex V to Directive 98/48/EC):*
 - *services supplied by transmitting data, but not at individual request, for simultaneous reception by an unlimited number of recipients (point to multipoint transmission): television broadcasting services (including near-video on demand); radio broadcasting services; (televised) teletext services.*

1.3 Is the rule aimed "specifically" at an information society service?

The new services are affected in one way or another by a large number of national general and sectoral regulations: one need only think, as far as the regulated professions are concerned for instance, of the systems of contract law and strict liability laid down in a civil code, of the framework laws laying down the rules on taking up and pursuing an economic activity, and of the rules on advertising, etc.

It is extremely important to emphasise that the obligation to notify in advance does not apply to all draft national regulations which - directly or indirectly, explicitly or implicitly - may concern information society services.

Only a limited number and a well-defined category of draft national regulations will, for the purposes of the Directive, have to be notified in advance, namely the regulations specifically aimed at information society services. All other regulations affecting services are not notifiable.

This is clear from the wording of Article 1(5), which, after defining a "rule on services" as a "requirement of a general nature relating to the taking-up and pursuit of service

activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services", explicitly excludes "any rules which are not specifically aimed at the services defined in that point".

It is appropriate in this context to recall recital 17, which explains that "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 rules and regulations with a more general purpose; whereas, however, general regulations which do not contain any provision specifically aimed at such services need not be notified".

For a draft regulatory instrument to be notifiable, it is not enough, therefore, that it should be described as a "rule" on services; it must also be aimed "specifically" at information society services.

The Directive contains certain clues which make it easier to understand this concept, indicating at one and the same time what is meant and what is not meant by "*specifically*". Thus, the fifth subparagraph of the Article 1, new point 5 states that:

- "a rule shall be considered to be specifically aimed at information society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner"; and
- "a rule shall not be considered to be specifically aimed at information society services if it affects such services only in an implicit or incidental manner."

In view of the above, it must be concluded that the Directive requires the notification of regulatory drafts whose justification, content and purpose indicate that they are directly and openly devoted, in whole or in part, to controlling information society services. In such a case, the provision(s) in a national regulatory instrument will be specifically designed and expressly drafted to reflect the fact that the activity/service is supplied "at a distance, by electronic means and at the individual request of a recipient of services".

Thus, not only are regulatory instruments covered which as a whole are devoted to information society services (e.g. a law on electronic signatures), but also regulations of which only a part (possibly an article or even a paragraph) specifically concerns an information society service (e.g. within a law on pornography, a specific provision on the liability of an Internet access supplier).

This idea is clearly expressed by recital 18, which states that "a provision specifically aimed at information society services must be considered as being such a rule even if part of a more general regulation".

In these scenarios, the whole draft has to be communicated to the Commission, accompanied where appropriate by any other provisions, knowledge of which is necessary to assess the scope of the draft technical regulation (in accordance with the second

subparagraph of Article 8(1) of Directive 98/34/EC). However, the standstill obligation will apply only to rules specific to information society services.¹¹

On the other hand, draft regulations need not be notified which relate only indirectly, implicitly or incidentally to information society services, i.e. which concern an economic activity in general without taking into consideration the typical technical procedures for supplying the information society services (e.g. a provision which prohibits the distribution of paedophile material by any means of transmission, including the Internet or electronic mail, among the various possible means of dissemination).

It is precisely with this consideration in mind that recital 5 asserts that the Directive "is not intended to apply to national rules relating to fundamental rights, such as constitutional provisions concerning freedom of expression and, more particularly, freedom of the press" and that "it is not intended to apply to the general criminal law either". Constitutional provisions and basic rules of criminal law - and of civil and company law - in theory sanction only fundamental and general principles, which do not relate specifically therefore to on-line activities.

Similarly, the basic provisions of a civil code or general laws on company and labour matters would not be covered by the Directive.

- *Examples of measures covered (as rules specifically aimed at information society services) :*
 - *an instrument of a legislative nature (an Act of Parliament) on the liability of the Internet access supplier;*
 - *an instrument of a regulatory nature (a Presidential or Royal Decree) on digital signatures;*
 - *a provision of an administrative nature (a ministerial decree) on consumer protection in the field of interactive teleshopping;*
 - *an administrative circular (from a ministry or public or authorised supervisory body under an obligation to notify) having specific legal effects and explaining the advertising laws applying specifically to services supplied on the Internet in the light of the general arrangements already in force.*
- *Examples of measures not covered (provided they do not contain any provision aimed specifically at information society services and without prejudice to examination of the measure with regard to the "goods" part of Directive 98/34/EC):*
 - *a framework law on the protection of minors;*
 - *a law on the system of press ownership;*
 - *a law on press freedom and the protection of privacy, including the civil and criminal penalties applicable if the rules laid down are infringed;*
 - *a regulation on the tax arrangements applicable to discography;*
 - *a regulation laying down or amending the general arrangements applicable to a liberal profession;*

¹¹ Case C-279/94 *Commission v Italy* [1997] ECR I-4743.

- *a decree establishing the new scale of fees for lawyers' services;*
- *a decree concerning the introduction and management of an official register for marketing consultants;*
- *a ministerial order on the legal arrangements applicable to travel agencies (licences, professional and financial guarantees, etc.);*
- *a circular concerning certain administrative procedures to be followed when organising promotional games.*

**1.4 Does the rule fall within one of the areas exempted by the Directive?
(Categories of rules relating specifically to information society services which do not need to be notified)**

The Directive provides for a number of exemptions: in other words, particular categories of national rules which, although aimed specifically at information society services, are explicitly excluded from the Directive's scope and need not therefore be notified in advance.

Such draft rules:

- (1) satisfy the criteria referred to in Article 10 of Directive 98/34/EC;
- (2) concern questions covered by Community rules on telecommunications services;
- (3) concern questions covered by Community rules on financial services;
- (4) relate to regulated markets and other financial markets or bodies (in this case, a partial exemption is involved; see below, point 1.4.4.).

These four exempt categories are examined below.

1.4.1. *Does the rule come under one of the exemptions provided for by Article 10 of the Directive (relating in particular to draft measures implementing Community directives)?*

A very broad exemption is already provided for by the basic Directive 98/34/EC: the new Article 10 merely reproduces and extends the previous wording relating to products and provides that the obligation to notify in advance and the standstill periods (provided for in Articles 8 and 9) do not apply to a number of national provisions specifically relating to information society services.¹²

¹² The new wording of Article 10 reads as follows (parts amended by Directive 98/49/EC in bold):

1. Articles 8 and 9 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary agreements by means of which Member States:
 - 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,
 - make use of safeguard clauses provided for in binding Community acts,
 - apply Article 8(1) of Directive 92/59/EEC (10),
 - restrict themselves to implementing a judgment of the Court of Justice of the European Communities,

For instance, attention should be drawn in this respect to the exemption, as regards rules on services, of national measures ensuring compliance with binding Community instruments, international agreements resulting in the adoption of common rules on services and measures which merely carry out a judgment of the Court of Justice or amend a technical regulation, as requested by the Commission with a view to removing an obstacle to the free movement of services or the freedom of establishment of a service provider.

All such national measures pursue the same objective of removing obstacles to the freedom of movement, and it must be possible rapidly to adopt those which are already subject to Community supervision.

On the other hand, provisions would not be covered by the exemption in Article 10 (and would therefore have to be notified in advance) which, while part of a national legislative instrument implementing a Community directive, nevertheless related to questions not covered by the directive to be transposed (e.g. in a law implementing the Distance Selling Directive,¹³ only the articles implementing the Directive would be covered by the exemption in Article 10; other articles in the same law relating to questions other than distance selling, e.g. on information of a promotional or statistical nature aimed at consumers, would definitely have to be notified in advance if they fall within the scope of Directive 98/48/EC).

Similarly, measures subsequent to or complementing national regulations implementing Community directives are not, as a general rule, to be considered as instruments ensuring compliance and are thus not covered by the exemption in Article 10: they must therefore be notified in advance.

- *Examples of measures excluded from the scope of the Directive*

National measures implementing Community directives are the classic example.

For instance, national measures implementing the Distance Selling Directive 97/7/EC are not subject to the obligation of prior notification laid down in Directive 98/48/EC.

Similarly, the Member States' regulations intended to implement the future Directive on electronic signatures (based on the proposal presented by the Commission on 13 May 1998) will not have to be notified under Directive 98/48/EC.

-
- restrict themselves to amending a technical regulation within the meaning of point 11 of Article 1, in accordance with a Commission request, with a view to removing an obstacle to trade or, in the case of rules on services, to the free movement of services or the freedom of establishment of service operators.
 - 2. Article 9 shall not apply to the laws, regulations and administrative provisions of the Member States prohibiting manufacture insofar as they do not impede the free movement of products.
 - 3. Article 9(3) to (6) shall not apply to the voluntary agreements referred to in the second indent of the second subparagraph of Article 1, point 11.
 - 4. Article 9 shall not apply to the technical specifications or other requirements or to the rules on services referred to in the third indent of the second subparagraph of Article 1, point 11."

¹³ Directive 97/7/EC, see footnote 7.

Also excluded (because they come under Article 10 of Directive 98/34/EC) will be national measures implementing the future Directive on the legal protection of services based on, or consisting of, conditional access.

- *Examples of measures covered by the Directive*

A national law implementing the Distance Selling Directive which imposed consumer-protection requirements additional to those in the Directive (e.g. with regard to the identification of on-line operators) would be subject to the obligation of prior notification.

Similarly, a national law which, at some time in the future, amends the distance selling arrangements already introduced by the implementing law by laying down new arrangements specific to on-line transactions (prior information supplied by a website to the consumer, procedures for on-line confirmation, electronic payment systems, etc.) should be notified at the draft stage, since it would not have been adopted at the time compliance with the Distance Selling Directive was ensured.

1.4.2 Does the rule concern matters which are the subject of Community arrangements for telecommunications services?

The second subparagraph of Article 1, new point 5 of Directive 98/48/EC states that "this Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of telecommunications services, as defined by Directive 90/387/EEC".

Directive 90/387/EEC¹⁴ (as amended by Directive 97/51/EC¹⁵) defines telecommunications services as "services whose provision consists wholly or partly in the transmission and routing of signals on a telecommunications network by means of telecommunications processes, with the exception of radio broadcasting and television".

In substance, therefore, it is laid down that all future national drafts relating to telecommunications matters already harmonised at Community level - i.e. including national measures other than those covered by the general exemption in Article 10 - will not fall within the scope of the Directive and will not therefore be subject to the obligation to notify.

The reason for this specific exemption is that in the field of telecommunications services (as in financial services, see following section) a large number of matters are already harmonised and are part of an already existing and sufficiently defined Community regulatory framework.

There are several Community directives governing a series of questions relating to these services. These include, for instance:

- Directive 90/387/EEC¹⁶ (already cited), as amended by Directive 97/51/EC,¹⁷ which lays down the principles (objectivity, transparency, advertising, non-discrimination,

¹⁴ See footnote 8.

¹⁵ See footnote 9.

¹⁶ See footnote 8.

¹⁷ See footnote 9.

etc.) and the procedural conditions for the supply of an open telecommunications network and the fundamental requirements which may justify restricting access to networks and public services (security and integrity of the network, interoperability, data protection);

- Directive 90/388/EEC,¹⁸ which concerns the conditions for the liberalisation of the supply of certain services (value added, voice, data transmission, etc.), as amended by Directives 94/46/EC¹⁹ (which sets out the conditions for the liberalisation of satellite services), 95/51/EC²⁰ (concerning the use of cable networks), 96/2/EC²¹ (on mobile and personal communications) and 96/19/EC²² (on the achievement of full competition on the telecommunications market);
- Directive 92/44/EEC,²³ which defines the procedures for the supply of a minimum collection of leased lines;
- Directive 97/13/EC,²⁴ which lays down the conditions and procedures applicable to general authorisations and individual licences in the field of telecommunications services, etc.
- Directive 97/33/EC,²⁵ which harmonises the conditions for the interconnection of public networks and telecommunications services accessible to the public and the conditions of access to such networks and services with a view to ensuring universal service and interoperability, etc.

As a result of this specific exemption, not only the measures referred to in Article 10 of Directive 98/34/EC but also all other national regulations relating to questions governed by the Telecommunications Services Directives (e.g. laws amending, clarifying, or repealing the scope of a law transposing a Directive) are not subject to the obligation of prior notification in Directive 98/34/EC (given that, for the most part, they will have to be notified under these Directives).

- *Example*

¹⁸ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10).

¹⁹ Commission Directive 94/46/EC of 13 October 1994 amending Directives 88/301/EEC and 90/388/EEC in particular with regard to satellite communications (OJ L 268, 19.10.1994, p. 15).

²⁰ Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services (OJ L 256, 26.10.1995, p. 49).

²¹ Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications (OJ L 20, 26.1.1996, p. 59).

²² Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ L 74, 22.3.1996, p. 13).

²³ Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ L 165, 19.6.1992, p. 27).

²⁴ Parliament and Council Directive 97/13/EC of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ L 117, 7.5.1997, p. 15).

²⁵ Parliament and Council Directive 97/33/EC of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ L 199, 26.7.1997, p. 32).

This exemption would concern, for instance, a law subsequent to a law implementing Directive 97/13/EC (on a common framework for general authorisations and individual licences in the field of telecommunications services) which laid down new general provisions in the field of licences.

Similarly, a future national law, subsequent to the law which transposed Directive 97/13/EC and laying down specific conditions for granting licences to supply electronic mail telecommunications services, will not, as a result of this exemption, be subject to the obligation of prior notification.

1.4.3 Does the rule concern questions which are the subject of Community arrangements for financial services?

As with the exemption provided for in the case of regulations relating to harmonised matters in the field of telecommunications services, the third subparagraph of Article 1, new point 5 states that: "this Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of financial services, as listed non-exhaustively in Annex VI to the Directive".

The reason for such an exemption from the scope of the Directive is identical and is due to the fact that such rules are part of an already sufficiently established Community legal framework.

It follows from this specific exemption that a future national law subsequent to an implementing law and relating to a question of this type, regulated by a Community directive on financial services, should not be notified even if it is aimed specifically at an on-line financial service.

Purely as a guide, a non-exhaustive list of financial services is supplied in Annex VI to Directive 98/48/EC, which gives the three main categories into which, very summarily, such services can be divided: banking, investment and insurance services.

There are many directives in this field, regulating various legal matters, depending on the specific sector concerned.

For instance, the Second Banking Directive (89/646/CEE²⁶), after giving a set of basic definitions ("credit institution", "authorisation", "branch", "own funds", "control", "holding", etc.) provides in particular for, inter alia, harmonisation of the conditions of authorisation (minimum capital, shareholders), mutual recognition of authorisations of credit institutions as part of the freedom to provide services or the right of establishment by means of branches, and harmonisation of certain conditions for the pursuit of the activity (evaluation of own funds, qualifying holding, etc.).

Directive 93/22/EC²⁷ contains rules on the same questions with regard to investment services in the field of securities.

²⁶ Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ L 386, 30.12.1989, p. 1).

²⁷ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27).

Other directives on financial services deal with different questions: e.g. deposit guarantee systems (94/19/EC²⁸), rules on the prevention of money laundering (91/308/EEC²⁹), matters of prudential supervision (92/30/EEC,³⁰ 89/647/EEC,³¹ 93/6/EC,³² 89/299/EEC³³), and information to be published by listed companies (82/121/EEC³⁴) and in the event of an acquisition or disposal of a major holding (88/627/EEC³⁵), etc.

The matters regulated by all the directives in the field of insurance, in particular with regard to the activities covered, the need for and the conditions of granting authorisation, the principles of and procedures for financial supervision, solvency, etc., should be added.

To sum up, as a result of the specific exemption provided for in the third subparagraph of Article 1, new point 5, no future national regulation concerning one of the questions regulated at Community level should be notified: not only would regulations coming under Article 10 of the Directive (in particular implementing measures, see previous point), but also all national regulations supplementing or subsequent to the implementing instruments (laws amending, clarifying or repealing the scope of a law transposing or having transposed a Community directive).

- *Examples of non-notifiable regulations:*

- *a draft law defining "investment services" and "investment enterprises" in respect of operators and financial activities on the Internet;*
- *a draft regulation on the deposit guarantee system of credit organisations issuing electronic money;*
- *a draft decree on on-line insurance operators' obligations as regards accounting, prudential and statistical information.*

1.4.4. Does the rule relate to regulated financial markets (stock exchanges) or other financial markets or bodies (partial exemption)?

Another specific exemption is provided for with regard to financial services by the fourth subparagraph of Article 1, new point 5, which states that:

²⁸ Parliament and Council Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes (OJ L 135, 31.5.1994, p. 5).

²⁹ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991, p. 7).

³⁰ Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis (OJ L 280, 24.9.1992, p. 54).

³¹ Council Directive 89/647/EEC of 18 December 1989 on a solvency ratio for credit institutions (OJ L 386, 30.12.1989, p. 14).

³² Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions (OJ L 141, 11.6.1993, p. 1).

³³ Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions (OJ L 124, 5.5.1989, p. 16).

³⁴ Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing (OJ L 48, 20.2.1982, p. 26).

³⁵ Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of (OJ L 348, 17.12.1988, p. 62).

"With the exception of Article 8(3), this Directive shall not apply to rules enacted by or for regulated markets within the meaning of Directive 93/22/EEC or by or for other markets or bodies carrying out clearing or settlement functions for those markets."³⁶

The reason for this exemption is the need to adopt without delay regulatory instruments which deal with on-line services relating to highly mobile and very fluid financial markets, where situations may change suddenly and unpredictably.

As a result of this exemption, the *rules drawn up by or concerning* regulated markets or other markets or bodies carrying out clearing or settlement operations for such markets are not subject to the obligation of prior notification (nor, of course, to the other provisions of the Directive on, say, "standstill" periods).

The only obligation to which such rules, in the interests of minimal transparency, are subject is that of "ex-post" notification, i.e. after adoption at national level pursuant to Article 8(3), which - as indicated by the fourth subparagraph of Article 1, new point 5 - is the only provision in the Directive which applies to these rules.

- *Examples of regulations which specifically concern on-line services relating to regulated markets or other markets and bodies and which are not therefore to be notified at the draft stage but only after they have been definitively adopted at national level:*
 - a draft regulation on computerised stock-exchange dealing and settlement;
 - a draft decree concerning the clearing system used for electronic trades made on the stock exchange;
 - a draft regulation relating to the procedures for the supply and conclusion of electronic transactions concerning securities traded on financial markets other than stock exchanges.

1.5 Can the rule notified (at the draft stage) be adopted immediately in domestic law?

(Assumption of prior notification but without a "standstill" period)

Directive 98/34/EC basically imposes a twofold obligation on Member States: notification of a national draft technical regulation with the above-mentioned characteristics, and the deferment of the adoption of the instrument at national level for a certain period (the "standstill", see Chapter 2 below).

The second obligation, however, is still not in force.

The Directive provides for certain cases in which, even if a national rule - following the tests described - should be the subject of prior notification, the Member state concerned is not obliged to defer its adoption. This possibility exists for:

- (1) rules associated with tax or financial measures;

³⁶ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27) provides basic definitions (e.g. of investment services, investment firms, financial instruments and competent authorities) and lays down the conditions for taking-up and pursuit, relations with third countries and the provisions concerning freedom of establishment and the freedom to provide services in this field.

- (2) circumstances where there is particular urgency.

If, therefore, a rule should come within one of these categories, it will indeed have to be notified in advance (at the draft stage) but without a standstill period, in accordance with the following terms.

1.5.1 Is the rule linked to fiscal or financial measures?

Pursuant to Article 10(4) of the Directive, Article 9 does not apply to the technical specifications or other requirements referred to in the third indent of the second subparagraph of point 11 of Article 1, i.e. specifically to "... rules on services which are linked to fiscal or financial measures affecting the consumption of ... services by encouraging compliance with such ... rules on services". Examples of fiscal and financial measures include tax incentives, taxes, and subsidies for the reception of certain services or for supply via certain procedures.

The non-application of the standstill periods to rules linked to fiscal or financial measures does not affect the possibility for the Commission and the Member States, under the last subparagraph of Article 8(1), to issue comments or reasoned opinions on the aspect "which may hinder trade and not the fiscal or financial aspect of the measure".

In short, a rule linked to a fiscal or financial measure:

- must be notified at the draft stage,
 - may be the subject of reasoned opinions or comments,
 - but does not trigger a standstill period for the Member State concerned, which may therefore adopt the rule in domestic law immediately after it has been notified.
- *Examples:*
 - *draft regulation linked to fiscal measures: a draft decree concerning the tax scales encouraging the use of on-line lawyers' services;*
 - *draft regulation linked to financial measures: a draft decree subsidising setting up of an electronic mail operator in certain island regions in order to promote this activity.*

1.5.2 Urgency clause

Without altering the previous urgency clause relating to rules applying to products, Directive 98/48/EC introduces more flexibility as regards recourse to the urgency clause as far as the rules on information society services are concerned.

It should be emphasised that, even where a Member State invokes the urgency clause, it is still obliged to notify the draft national regulation relating specifically to information society services and to state why urgency is justified.

The Commission, which will have to assess whether urgency is justified, will reply to the request as soon as possible.

It may either accept the case for urgency (without prejudice to the assessment of the substance of the national measure) or challenge it. In the latter instance, if the national measure is adopted definitively in the Member State in breach of the standstill periods, the

Commission reserves the right to initiate vis-à-vis the Member State concerned the procedure provided for by Article 169 of the Treaty.

To sum up, Article 9(7), as amended, establishes that for rules relating to information society services the urgency clause applies in three types of situation.

(A) Firstly, "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". These are the same circumstances as those already provided for in the basic Directive 98/34/EC.

(B) Secondly, "for urgent reasons, occasioned by serious and unforeseeable circumstances relating to ... public policy, notably the protection of minors".

Compared to the previous provision in Directive 98/34/EC, this is a novel situation, which is limited to rules relating to information society services.

This new concept reflects the special importance attached by the Community legislator to the protection of minors in the context of the new services - a subject which is also covered by other Community initiatives.³⁷

The concept of public policy, which figures *inter alia* in Articles 56 and 66 of the EC Treaty, can be clarified in the light of the case-law of the Court of Justice (which has stated its views on this concept on many occasions in cases concerning not only the free movement of services and the right of establishment but also the free movement of goods and workers).

While not giving a precise definition, the case-law recognises this concept as possibly varying from one country to another and from one period to another³⁸ and as allowing the competent national authorities an area of discretion within the limits imposed by the Treaty.³⁹

However, the Court also explains that the concept of public policy must be interpreted strictly⁴⁰ and cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community.⁴¹

The Court also provides certain additional information of both a positive and a negative nature.

Thus it explains that the invocation of public policy must be justified on general interest grounds,⁴² presupposes the existence of a genuine and sufficiently serious threat affecting

³⁷ The Council, on 28 May 1998, noted unanimous agreement on the recommendation on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity; see also the proposal for a multiannual action plan on promoting safe use of the Internet (COM (97) 582 final, 26.11.1997).

³⁸ Case 30/77[1977] ECR 1999.

³⁹ Case 30/77[1977] ECR 1999.

⁴⁰ Case C-260/89 [1991] ECR I-2925.

⁴¹ Case 30/77[1977] ECR 1999.

⁴² Case C-484/93 [1995] ECR I-3955.

one of the fundamental interests of society⁴³ and must be interpreted in the light of (i.e. in conformity with) the general principles of law and in particular of fundamental rights and the general principle of freedom of expression.⁴⁴

Moreover, the Court states that public policy cannot be invoked for:

- objectives of an economic nature,⁴⁵
- considerations of an administrative nature,⁴⁶
- cultural policy objectives,⁴⁷
- considerations of consumer protection.⁴⁸

From a more general point of view, it should be pointed out that urgent reasons, whether under (A) or (B), that can justify recourse to the immediate adoption of a national measure must, in any event, be due to circumstances which are not only serious but unforeseen, linked to all the purposes mentioned.

Accordingly, it is very important to bear in mind the aspects of the general interpretation of the nature and specific purposes of the urgency clause mentioned by recital 22, which, having stressed the exceptional nature of recourse to such a clause, explains that its application is justified in particular in "circumstances of which there was no previous knowledge and the origin of which is not attributable to any action on the part of the authorities of the Member State concerned, so as not to jeopardise the objective of prior consultation and administrative cooperation inherent in this Directive".

It is in this rigorous spirit, therefore, that the urgency clause should be interpreted and applied by both national and Community authorities.

(C) Thirdly, in the case of information society services, the urgency clause may also be invoked, where rules relating to financial services are concerned, "for urgent reasons occasioned by serious circumstances relating to the protection of the security and the integrity of the financial system, notably the protection of depositors, investors and insured persons".

This special form of urgency clause is provided for exclusively in the field of financial services on account of certain risks and requirements specific to this sector.

⁴³ Case 30/77[1977] ECR 1999.

⁴⁴ Case C-260/89 [1991] ECR I-2925.

⁴⁵ Case C-17/92 [1993] ECR I-2239.

⁴⁶ Case 205/84 [1986] ECR 3755.

⁴⁷ Case C-17/92 [1993] ECR I-2239.

⁴⁸ Case 177/83 [1984] ECR 3651.

CHAPTER 2

FUNCTIONING OF THE DIRECTIVE

2.1 Procedures

The operating practicalities and the procedural stages for Directive 98/48/EC correspond as a whole to those specified in the consolidated basic Directive 98/34/EC.

More particularly, national regulations relating to information society services are covered by a number of the provisions in the consolidated Directive and currently applicable to draft rules on products. These provisions concern, in particular, notification at the draft stage and the various standstill periods discussed below.

Consequently, the concepts relating to the various procedural stages discussed in the present document (e.g. standstill period, comments and detailed opinions) must also be understood in the light of the clarifications and explanations given in the Vade-mecum to the operation of the information procedure in the field of technical regulations (8 June 1995), which accompanies the amended Directive 83/189/EEC (recently consolidated by Directive 98/34/EC), and in the brochure entitled "Comments on Directive 83/189/EEC - Guide to information procedures for national technical standards and regulations". Reference should be made therefore to these documents for more detailed practical guidance on the Directive as a whole.

The notification procedure can be broken down into two main stages:

- (1) the initial stage, which takes place automatically after notification, and
- (2) the follow-up stage, not automatic, triggered by possible reactions to the notification.

2.1.1 First, automatic stage, involving a standstill period of 3 months

Notification of a draft technical regulation at the draft stage automatically triggers a standstill period of three months, except where the urgency clause applies or in the other circumstances which are provided for in the Directive and which make immediate adoption possible.

This means that during this period the rule may not be definitively adopted at national level (Article 9(1), unchanged from Directive 98/34/EC).

When notifying the draft, the Member State also communicates the reasons why such a regulation is needed (first subparagraph of Article 8(1)).

As already stated, the Member State simultaneously communicates, where appropriate, the basic legislative and regulatory provisions principally concerned, knowledge of which is necessary for the assessment of the draft technical regulation (second subparagraph of Article 8(1)).

As regards the moment of notification in relation to the procedure for adopting the national law, it should be stressed that, in accordance with Article 1, new point 12 (new numbering), the notified text must be "at a stage of preparation at which substantial amendments can still be made".

The purpose, evidently, is to ensure that the system introduced by Directive 98/34/EC is genuinely effective.

It is important to emphasise, moreover, that it is still possible for specific questions on doubtful aspects of a draft in the process of preparation to be put, informally, to the Commission's departments. In this way, any unnecessary notifications are avoided and any problems concerning the internal market rules are identified early -and hence prevented - with a view to notifying a more consistent draft.

With a view to facilitating notification by the competent national authorities, the standard form for transmitting draft rules on information society services to the Commission will be found in an annex to this Vade-Mecum. In substance, the form reproduces the same type of information as that contained in the form already used in connection with Directive 98/34/EC for rules on goods.

2.1.2 Second possible stage, which may involve an extension of the standstill period beyond 3 months

During the three months following notification of the national regulatory draft the following developments may occur.

(a) No reaction

If no reaction is forthcoming, the notified draft may be adopted immediately after the three months have expired.

(b) Observations

If one or more Member States and/or the Commission issue comments on the notified draft, the national regulation may, as in the previous example, be adopted immediately after the three months have expired.

Although the comments do not delay the adoption of the notified regulation, the Member State concerned must nevertheless take account of them as far as possible when subsequently finalising the instrument at national level.

(c) Detailed opinion(s)

One or more Member States and/or the Commission may address a detailed opinion on the notified project to the Member State concerned, if they think that aspects of the proposed measure may create obstacles to the freedom of establishment or the free movement of services in the internal market.

In such a case, adoption of the regulatory draft at national level is postponed by a further month, the total standstill period thus becoming four months (there is a significant difference compared with technical regulations for goods, where, in such an event, the total standstill period is generally six months).

With regard to detailed opinions on draft rules on information society services, the new second subparagraph of Article 9(2) stresses the importance of safeguarding the cultural policy objectives pursued by national measures, provided of course that these are

consistent with Community law and, in particular, with the internal market's principles of freedom of movement.

In addition, still in regard to rules on services, the following subparagraph, in a spirit of full transparency, requires the Member State concerned to say why, if necessary, it cannot take a detailed opinion into account.

This provision explains the obligation on the Member State in question, which is valid for the whole Directive (i.e. both the "products" and the "services" parts), to report to the Commission on the follow-up it intends to give to detailed opinions. The Commission subsequently comments on this report.

(d) Possible establishment of the existence of a proposal for a Community instrument on the subject

The Commission may find that the draft technical rule refers to a subject covered by a proposal for a directive, regulation or decision already presented to the Council: in such a case, the total standstill period is extended to 12 months, to which a further six months may be added (making a total period of 18 months) if in the meantime (i.e. during those 12 months) the Council adopts a common position on the above-mentioned proposal.

It should be stressed first of all that, as regards draft rules on information society services, unlike draft rules on products, there is no provision for the standstill period to be extended to 12 months where the Commission simply announces its intention to propose or adopt a directive, regulation or decision.

It should also be pointed out that, even if the draft does relate to a subject covered by a proposal put forward by the Commission, recital 23 limits any suggested extension of the standstill period to 12 months - or eighteen months - only "if the draft national rule contains provisions which are not substantially consistent with the proposal submitted by the Commission". In other words, as far as legislative substance is concerned, the national draft has to diverge from the proposal.

The possibility for the Commission to extend the standstill period does not, therefore, follow automatically from the existence of a Community proposal but arises only in well-defined circumstances.

In addition, even in such a scenario, the twelve-month standstill period does not apply as a matter of course. Directive 98/34/EC in no way imposes on the Commission an obligation to establish the existence of a proposal for a Community instrument: rather, it acknowledges such a possibility by granting the Commission discretion to decide where appropriate, in the light of the circumstances, whether it is advisable to make - or not to make - such a finding.

2.1.3 Renotification of a draft that has already been notified

The third subparagraph of Article 8(1) of the Directive requires a Member State which has already notified a draft national rule to renotify it where the draft has undergone certain significant changes which have the effect of :

- amending its scope,
- shortening the original timetable for implementation,

- adding specifications or requirements,
- making these more strict.

In substance, there is no obligation to "renotify" the national draft in the case of simple drafting changes with no effect on the substance of the requirements laid down. However, there is such an obligation where substantial changes have been made which render the text more strict as regards scope, timetable or content.

The initial standstill period of three months starts again when the draft is renotified.

It should again be emphasised that it is always possible for Member States, if they have doubts or need clarification, to examine and analyse informally with the Commission's departments the significance of any changes made to a national draft.

2.1.4 *Non-notification at the draft stage of a rule on services*

Infringement by a Member State of the obligation to notify a rule on information society services at the draft stage results, in accordance with the decisions of the Court, in that rule becoming inapplicable and hence impossible to invoke against individuals.

In Case C-194/94 *CIA Security*, which confirmed the line taken by the Commission in its communication of 1 October 1986 on the subject, the Court of Justice ruled that it is for a national court to refuse to apply a national technical regulation which has not been communicated in accordance with the Directive.

In Case C-226/97 *Lemmens*, the Court explained however that while failure to notify technical regulations renders such regulations inapplicable inasmuch as they hinder the use or marketing of a product which is not in conformity therewith, it does not have the effect of rendering unlawful any use of a product which is in conformity with regulations which have not been notified (e.g. in the context of criminal proceedings for drunk driving).

As the Court's case-law illustrates, this consequence of the fact that a non-notified rule cannot be relied upon is inherent in the purpose of the Directive, which is to protect the free movement of goods and which, pursuant to Directive 98/48/EC, is extended to the free movement of services and to freedom of establishment with regard to information society services.

The obligation to notify is the essential means of achieving such control. By failing not only to inform the Commission and the other Member States but also to give them the chance to react and propose changes, non-compliance amounts to a substantial procedural flaw which renders non-notified rules inapplicable and means that they cannot be invoked against individuals.

These consequences also apply in the case of a national draft which, having been notified and substantially amended in accordance with point 2.1.3 above, has been adopted without being previously renotified.

2.2. Committee

The Committee already operating under Directive 98/34/EC in the field of technical standards and regulations for products is now invited to extend its remit to cover rules on information society services.

Its rules of procedure remain unchanged, with two exceptions.

The first difference concerns the Committee's composition. A new subparagraph has been added to Article 6(1), explaining that: "the Committee shall meet in a specific composition to examine questions concerning information society services".

Recital 25 of Directive 98/48/EC - which reads "whereas it is appropriate that, in the context of the functioning of Directive 98/34/EC, the Committee provided for in Article 5 thereof *should meet specifically* to examine questions relating to information society services" - means from an operational point of view that the Committee should hold meetings specifically devoted to matters relating to services, given the particular nature of the problems compared with those in the products sphere.

As a result, within the Committee, which was hitherto divided into two parts dealing with technical regulations and standardisation respectively, a new section is created devoted specifically to information society services.

In this new section the Member States will thus be able to be represented by their experts from the various government departments responsible for the new services, who will be able to contribute their knowledge of the sector and its problems, which are different from those in the products sphere.

The second difference, introduced by the new Article 6(8), refers to the henceforth wider possibility for the Committee - and for the Commission - to consult natural or legal persons from industry or academia capable of delivering an expert opinion on the social and societal aims and consequences of any draft rule on services.

Possible recourse to the specialist expertise of persons highly qualified in the field of rules on services is in keeping with the external consultations already provided for by the second subparagraph of Article 6(7) of Directive 98/34/EC.

Nevertheless, this new possibility emphasises the active, incisive role which, in a variety of forms (see next chapter), experts in and operators of the new on-line services will be called upon to play, so that the Directive functions transparently and effectively.

CHAPTER 3

ROLE OF INTERESTED CIRCLES

The inherent purpose of Directive 98/34/EC - to increase the transparency of rules - does not only require openness and accessible information on the part of the national authorities, but also that it should be possible for any individual affected by information society services, notably operators and users, to be able to contribute their experience and possibly influence the preparation of rules on the sector.

This idea was emphasised and strengthened by the European Parliament, which amended the Directive at second reading in order *inter alia* to make it explicitly possible to consult representative bodies from the universities or industry.

3.1. Access by representative bodies, firms and individuals to information

Article 8(4) of Directive 98/34/EC already provides that the information and notifications supplied by Member States are not treated as confidential, unless the Member State expressly asks that they should be and, in any event, justifies each such request.

Above all, therefore, given the scale and the complex implications of regulations on the new services, it is essential to enable the addressees particularly concerned (representative bodies, firms, consumers' and users' associations, private individuals, etc.) to obtain information.

As regards the basic Directive 98/34/EC, certain sources of information are already operational and may also be used therefore for rules relating to information society services. These are in particular:

(a) information published each week in the Official Journal of the European Communities, series C, giving the titles of notified national drafts (which will also include future rules on information society services), the date when the initial standstill period of three months expires and the instances where a request for urgency from the Member State concerned has been accepted.

In this way, individuals, among others, can be informed of the regulatory changes in progress and can check whether a rule imposed on them in national law has indeed been notified, in order possibly to claim that it is inapplicable in accordance with the *CIA Security* judgment mentioned above;

(b) information published each year, also in the Official Journal of the European Communities, series C, containing statistics on the notifications received, the reactions to them and the number of infringement proceedings initiated for failure to comply with the services-related provisions of the Directive;

(c) the information which may be obtained from the central units in the Member States (designated in Committee by the Member States, in accordance with the last subparagraph of Article 1, new point 11), whose job it is to notify national regulatory drafts to the Commission;

(d) the press releases regularly issued by the Commission in the event of infringement proceedings for failure to comply with certain provisions of the Directive and in particular with the obligation to notify in advance;

(e) the general and specific reports on the operation of the Directive provided for by Article 11 and, in particular as far as the part on information society services is concerned, that provided for by Article 3 of Directive 98/48/EC (see Chapter 4).

3.2. Consultation of, and possible reactions from, the interests concerned

Once access by the interests concerned to information on the functioning of the Directive is assured, i.e. both to specific information (on each regulation) and general information (on the Directive as a whole), it is also essential, in order to achieve the objective of preventing obstacles to the internal market for the new services and to promote their balanced development, to allow operators and users to participate actively in the analysis of the national drafts notified.

To supplement these information resources, the Commission's departments are therefore considering enhancing, in particular, the role of the interests concerned by increasing contacts with them (through all the traditional means of direct and indirect communication) and by resorting eventually to the new communications technologies, such as:

- the creation of a website which will contain a database with all the notified regulatory drafts and related non-confidential information resulting from the application of the Directive (date of notification, reactions, amendments, entry into force, etc.);
- the creation of a specific electronic address (besides that currently used by the Commission department responsible for the application of the procedure for notifying and managing the projects received under Directives 98/34/EC and 98/48/EC: "83-189@dg3.cec.be") for substantive questions and correspondence relating to information society services between the Commission's departments and the interests concerned, like that introduced for commercial communications (ComCom@dg15.cec.be).

Lastly, as already emphasised, in addition to the possibility for the Committee and the national authorities already provided for by Directive 98/34/EC, Directive 98/48/EC has expressly emphasised, with regard to rules on services, the right of the Commission to consult experts from the universities and industry and, where possible, representative bodies in order to assess the social and societal consequences of certain draft national rules.

The Commission intends to take account of this possibility, with the general aim of actively involving particularly qualified persons and operators in this new field and thus benefiting fully from their experience and expertise.

CHAPTER 4

IMPLEMENTATION OF DIRECTIVE 98/48/EC

4.1. Timetable and arrangements for implementation

Directive 98/48/EC must be implemented at the latest by 5 August 1999.

Member States have two formal obligations as regards national provisions implementing the Directive:

- (1) they must see that such provisions contain, or are accompanied by, a reference to Directive 98/48/EC;
- (2) they must communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by the Directive.

4.2. Preparation of the lists of designated national authorities

Pursuant to the penultimate subparagraph of Article 1, point 11, the Member States are required, at the latest by 5 August 1999, to designate the national authorities, other than central authorities, which lay down rules on services and which will appear on a list drawn up by the Commission in the above-mentioned Committee.

The list is intended to supplement, where appropriate, that already drawn up for the purposes of Directive 98/34/CE regarding products.

4.3. Reports on implementation of the Directive

Pursuant to Article 3 of Directive 98/48/EC, the Commission will, at the latest by 5 August 2001, have to evaluate the application of Directive 98/34/EC, as amended by Directive 98/48/EC, which will basically cover the part relating to services.

The report, intended for Parliament and the Council, must, in particular, take account of technological change and developments on the market for information society services, and of any observations communicated by the Member States on this subject.

4.4. Clause concerning the possible revision of the Directive

The same Article 3 also provides that, at the latest by 5 August 2002, the Commission may, if necessary, make proposals amending the Directive.

4.5. Reference to Directive 98/34/EC in national rules

Under Article 12 of Directive 98/34/EC, which remains unchanged, when Member States adopt at national level a rule on services which falls within the scope of Directive 98/48/EC, that rule must contain a reference to Directive 98/34/EC or be accompanied by such a reference.

The point of the reference is that it makes the job of checking compliance with the Directive easier, given that it is important to have made a correct notification if the adopted national rule is to be invoked against individuals.