# CP 1999/079 EN Final

**C**omité **P**ermanent des Médecins Européens
Standing Committee of European Doctors

**Original : English**

## Subject

Position of the Standing Committee of European Doctors on the proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market

## Sujet

Position du Comité Permanent des Médecins Européens sur une proposition du Parlement Européen et du Conseil relative à certains aspects juridiques du commerce électronique dans le marché intérieur

**Concerning / Concerne**

Board
Conseil

**Purpose / Objet**

Approved by the Board on 18 September 1999
Approuvé par le Conseil le 18 septembre 1999

**Key word / Mot clé**

Electronic commerce
Commerce électronique

17/09/99

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**Position of Standing Committee**

**on the Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market [COM (1998) 586 final dated 18.11.1998]**

## I.

1. The objective of the proposal is to create a legal framework for electronic commerce in the internal market, the proposal relating to the following problem areas:

   - establishment of service providers in the Information Society;
   - commercial communication (advertising, direct marketing, etc.);
   - "online" conclusion of contracts;
   - responsibility of intermediaries;
   - legal application.

2. The main focus of the position refers to the effects of the Directives on practice of the medical profession and the rules governing this (Articles 2, 6 to 8). The primary aspect of this issue is that the Internet may be the most important and preferred medium for "electronic communication" among doctors and the interested public (i.e. potential patients), and also with individuals or with patients in specific circumstances.

3. For the purpose of practising the medical profession, computer communication networks such as the Internet present an opportunity, but also entail risks regarding the quality of practice of the medical profession and protection of patients. “Information Society services” may present a new area of activity for doctors, either regarding new forms of medical consultation, or regarding online contacts (communication) between doctors and patients. General information and also targeted advertising are technically accessible via the new medium. Offers of consultation via the Internet are conceivable. According to the Commission’s mainly economically oriented terms, what forms an incentive for varied economically relevant initiatives, does however conceal in the new dimensions of electronic commerce considerable dangers for the specific professional identity of the medical profession and practice of the medical profession, and also of its recognised rules, which are also restrictive in the interests of quality assurance and protection of patients. Advice that is accessible via the Internet and is not specific to the patient and also anonymous patient consultation as methods of advertising, reply to enquiries submitted by e-mail are highly controversial activities, which according to some professional rules are also prohibited activities for doctors in some Member States and are conceivable under the title “electronic commerce and electronic communication”.

4. With regard to the area of application of the proposed Directive these rules concerning offering medical services via “Information Society services” (e.g. the Internet) form the primary problem.

5. To this end an evaluation of the relevant rules contained in the proposal is required.

## II.

The following individual points must be noted:

1. Article 3 Para. 1 of the proposal states the following:

> "Each Member State shall ensure that the Information Society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within this Directive's co-ordinated field."

This introduces the principle of the country of origin for the general legal framework of a service provider, i.e. in the context of cross-border communication service providers are subject to the rules applicable in their country of incorporation. The principle of the country of origin thus also regulates the supervisory responsibility of official bodies. The relevant national rules would thus apply for electronic services (e.g. consultation) and also professional communication (e.g. advertising). With reference to the specific case of medical services, this means that for the question who (e.g. a doctor or another "healer"?) "may offer or provide" which services (e.g. online consultation of patients, which is prohibited in Germany, for example) using whatever type of advertising depends on the country of incorporation of the service provider. So Article 3 of the proposed Directive would supersede the rules in force in the country of the service recipient (e.g. the patient) and would affect the structure of the health service. Accordingly, it would be possible to advertise for services from one Member State, where there is no limitation on doctors for certain medical services, in another Member State, although performance of such services is subject to the limitation on doctors in Germany. In other words: Article 3 amends the structure of the rules on doctor's and medical services in so far as rules on professional access and professional practice exist, which are also created in the interest of consumers (patients). The national rules concerning regulation of access to the profession and practice of the profession have a protective function in favour of quality of services and patient.

In that protection of the public health and the health of patients is an indispensable objective to be ensured, the principle of country of origin is contrary to the Treaty (article 49) and to the secondary Community law concerning cross-border services. These provisions and their application following the judgements of the Court of Justice, submit service providers to the legal conditions of the country in which the patient receives the health care. As far as doctors' services are concerned, the principle of the country of origin is also in contradiction with the Directive on free movement of doctors – 93/16/EEC – dated 5.4.1993 (OJ EC No. L 165 dated 7.7.1993). This Directive provides that – also in the case of provision of services without establishment – the rules of the "country of admission" shall apply in the internal market, both due to the internal organisation of the health systems and also for the protection of patients. According to the jurisdiction of the ECJ regarding the term service, cross-border communication services should also be included within the meaning of this rule. So Art. 17 Para. 1 P. 2 of Directive 93/16/EEC also applies for such cross-border communication services in the medical field :

Even if in accordance with Article 1 Para. 3 of the proposed Directive discussed here

> "the level of protection for public health and consumers introduced by existing Community rules (is to remain) unaffected",

and the draft Directive thus contains a proviso for other rules, there is however a lack of adequate clarity in this respect to resolve the above stated contradiction.

The principle of validity of the professional right of place of activity set out in Directive 93/16/EEC and not the place of establishment also complies with the view of European doctors as contained in the Annex on "Principles of European Medical Ethics" approved by the "Conférence Internationale des Ordres et des Organismes d'attributions similaires" in 1995:

> "A doctor, who practises as a doctor as a service provider in another Member State of the European Community than that where he/she is established or develops his/her professional activity and where he/she belongs to a professional association, must observe the professional rules of the Member State where he/she performs a service. This also applies if the doctor wishes to

restrict his/her activity merely to drawing attention to his/her activity in the other Member State; announcement of his/her activity is permitted to the doctor only to the extent that it is permitted to doctors in the Member State where he/she announces his/her activity as a doctor and in accordance with the general rules of professional laws."

In Art. 22 Para. 3 the proposed Directive contains a proviso regarding the rules of the Member States on the protection of public health, which is however not adequate to secure the fundamental systematic protective function of the validity of professional law at the place of practising activity.

The Standing Committee has the following view:

In the case of medical services the principle of the country of origin must be restricted both in the interest of the healing professions and also in the interest of the public. It must be ensured that not only the provision contained in Art. 49 of the Treaty and in secondary Community law (Art. 17 Para. 1 P. 2 of Directive 93/16/EEC)) is clarified, but in Annex I of the proposed Directive discussed here the opportunity should be created beyond the provision contained in Article 22 Para. 1 to subject the supply and performance of medical services to patients via electronic media to special rules or to retain such rules as applicable.

## 2. Commercial communication (Article 8 of proposal)

It is in compliance with the former interpretation of the law that the EC Treaty does not contain any authorisation for the Community to harmonise national regulations governing practice of a profession for regulated professions. Such national regulations on practice of a profession must indeed be measured against the principles of the fundamental liberties contained in the Treaty; generally however they comply with these regulations concerning the free movement of goods and freedom of services. It appears highly dubious to intervene in national rules concerning professional law in relation to the subject of electronic commerce and electronic communication. The Standing Committee does in fact welcome the consideration that standardisation can be achieved by means of transnational, i.e. European, rules of conduct for the

professional groups concerned. However, this should be on a voluntary basis. The Standing Committee expressly informs the Commission at this stage that it is working on such European professional rules for the professional practice of doctors. However, this can only be useful if a Community position of the professional groups concerned is developed freely. The Annex of the "Principles of European Medical Ethics" already mentioned forms the basis for future activities of the Standing Committee. For this reason, the Standing Committee considers the subsidiary mandate and the related *facultas alternativa* issued to the European Commission, to determine such professional rules itself if necessary, to be neither permissible under Community law nor necessary and expedient. A legal mandate e.g. to European doctors as a self-governing body is sufficient to achieve the objectives.

## 3. Electronic contracts

The Standing Committee has serious doubts whether the conclusion of electronic contracts within the health service is acceptable within the terms of consumer and patient protection. The Member States should at least have the opportunity of finalising more specific rules concerning the area of application of electronic contracts within the health service taking into account both the interests of the treating doctors and hospitals and also those of patients and in the light of the rule, that physical contact between doctor and patient is indispensable.