

Emerging Patterns of E-Commerce Governance in Europe - the European Union's Directive on E-Commerce.

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ABSTRACT.

Electronic Commerce governance has developed into a particularly important policy area for the European Union over the last ten years. This paper explores the essential features of the development of the EU's policy on e-commerce to date, with particular focus on a critical evaluation of what is, arguably, its centrepiece, the Directive on E-Commerce (European Parliament and European Council of Ministers, 2000). Its central aims are, firstly, to identify the origins, and explore the essential features, of the EU's policy approach to e-commerce and, secondly, to explicate how the Directive on E-Commerce has been transposed to EU Member State level, in order to illustrate - in a conceptually informed manner - the emergent governance arrangements for e-commerce across the EU and the implications this may hold for its regulation and future development.

Emerging Patterns of E-Commerce Governance in Europe - the European Union's Directive on E-Commerce¹.

Introduction.

The increasingly well-documented growth of the Internet as a locus for commercial activity has raised a plethora of issues with regard to the extent (if any), and shape, of governance arrangements necessary to facilitate its development and ensure its smooth functioning (see Mathiason, Mueller and McKnight, 2004). Furthermore, given the intrinsic global 'logic' of the Internet, these policy challenges have a commensurate global relevance and there is some evidence of early efforts having been made within a series of such fora to tackle issues related to the economic aspects of Internet governance (Simpson and Wilkinson, 2003). However, given the complex and problematic nature of e-commerce governance issues in the global context, it is unsurprising that regional and national approaches are developing, most notably in the US and Europe where the majority of e-commerce pioneers are located. As in other areas of economic activity, functional necessity aside it is clear that there is considerable potential gain to be accrued from securing acceptance of a nationally/regionally developed policy model "exported" to the global policy scenario (Lazer, 2001).

Electronic Commerce governance has developed into a particularly important policy area for the European Union over the last ten years, though its origins can be traced even earlier to technology policy initiatives to encourage the development of Electronic Data Interchange². However, the emergence of the Internet as a globally growing and commercially significant communications infrastructure in the early-to-mid 1990s marked a clearly discernible concentration of policy energy by EU policy makers on the perceived need to develop a strong European electronic commercial capacity to exploit the Internet's potential. Communications policy issues - most notably those related to the telecommunications and broadcasting sectors - have received, historically, highly specific treatment in Europe due to their cultural, economic and political significance. Here, national policy traditions produced a tendency towards distinctly balkanised approaches and commensurately limited international policy activity which was, at most, coordinative in nature. However, from the latter half of the 1980s onwards, the well-documented trends of general economic globalisation and liberalisation began to impinge on the traditional patterns of commercial organisation of the communications sector in Europe, simultaneously calling forth an examination of then existent governance patterns.

Change has been most significantly witnessed in telecommunications, where a fundamental Europeanisation of regulation has occurred (see Thatcher, 2001) linked into the emergence of a global system for telecommunications trade regulation within the World Trade Organisation (Simpson and Wilkinson, 2002). Much more resistant to liberalisation and, certainly, Europeanisation of regulatory approaches, however, has been the broadcasting element of communications. Here a policy debate of the late 1990s within the EU on the possibility of creating a common convergent system of regulation at EU level for all ICTs produced the conclusion that *content-laden* ICT services should be reserved for separate treatment and left outside any common framework. Aside from broadcasting, and for fundamentally different reasons, this

outcome was to prove particularly salient for another excluded element from the subsequently created EU common communications regulatory framework (European Commission 2000): e-commerce.

This paper explores the essential features of the development of the EU's policy on e-commerce to date, with particular focus on a critical evaluation of what is, arguably, its centrepiece, the Directive on E-Commerce (DEC) (European Parliament and European Council of Ministers, 2000). Its central aims are, firstly, to identify the origins, and explore the essential features, of the EU's policy approach to e-commerce and, secondly, to explicate how the Directive on E-Commerce has been transposed to EU Member State level, in order to illustrate - in a conceptually informed manner - the emergent governance arrangements for e-commerce across the EU and the implications this may hold for its regulation and future development.

We begin by outlining our chosen conceptual approach to explaining EU e-commerce governance, by drawing on the literatures on negative coordination governance - of which we regard EU e-commerce policy as a special case - and self-regulation. The paper then provides the policy context within which the EU began to advance specific policy measures in e-commerce over the course of the last decade, before moving to an analysis of the DEC's key features. Here, we argue, perhaps contentiously, that, rather than developing as a communications policy issue, e-commerce at EU level has been treated primarily as a special case of commercial policy, despite it being an example of a content-rich series of communications services. We account for why this has occurred and explore its practical consequences and policy implications, concluding that a complex and untested "policy nexus" for e-commerce is developing at EU level.

The paper then considers the pattern of transposition and early implementation of the Directive on E-Commerce to date in three case study countries: the UK, Finland and Germany - cases which represent three early adopters and forerunners of e-commerce in Europe. We do this for two reasons. First, we explore, characterise and compare the chosen policy methodologies for the transposition and implementation of the Directive. Here, we consider the extent to which the much-written-about European domestic politics context or national intervening variable is affecting emerging e-commerce governance in our case studies, given three factors: the "newness" of e-commerce, its global characteristics and the lack of a nationally-rooted governance tradition (unlike that in other parts of the communications sector). Second, though in the early stages of adoption, we highlight a number of problems which have arisen with the directive and are likely, if unresolved, to be faced by consumers, sellers, service providers and policy makers in the future.

The overall tenor of our argument in the paper, is that despite the adoption of as liberal an approach to e-commerce governance as possible through studious avoidance of "traditional" European communications regulatory paradigms and traditions, a whole new series of governance issues has arisen which, ironically, is unlikely to reduce the overall level of required regulatory activity - such activity will merely be dissipated to "general" commercial governance fora. A liberalised approach will not, therefore, negate the need for governance of e-commerce - about which considerable policy learning is still to be done - at European and national level. What is also clear

to us is that all of this e-commerce policy activity will only be significant in the longer term, if a common legal environment characterized by consistency and clarity is created, and as a by-product the take up of e-commerce - by businesses and consumers - increases, something which is by no means certain to occur.

Changes in the Global Political Economy: Globalisation, the Emergence of the Regulatory State and Negative Coordination.

In the last fifty years or so, a series of well established trends in the globalisation of production have called forth a range of new responses by states to the task of managing economic sectors, epitomised by liberalisation and the growth of independent regulatory bodies which has led, in the academic literature, to a focus on what has been termed the regulatory state (MacGowan and Wallace, 1996; Majone, 1994, 1996). Jayasuriya (2001) argues that globalisation of the economy has produced a very uncertain environment pressurising states to aim to create domestic stability, a task problematised by their inability to coordinate bargaining between different interest groups - notably business and consumer - in ways which were possible in the context of the corporate state. As a consequence, states have developed policies to underpin the smooth functioning of international markets, manifest in a pre-occupation with the creation of independent from government, self-regulatory institutions responsible for different economic sectors and, very importantly, a prioritisation of the tasks and procedures of these organisations to ensure their credibility. Thus, “proceduralism is the institutional response to the structural imperatives of the new global economy” (p120) and credibility, if sufficiently realised, promotes stability. Jayasuriya notes that “Emblematic of this form of economic governance is the increasingly juridical and legalistic nature of economic policy but a legalism that is directed at the regulation of governance structures” (Jayasuriya 2001: 112).

The communications sector in Europe, historically insulated from market forces through state ownership and intervention and very much a series of nationally segmented markets, began, since the beginning of the 1980s, to be altered by policy action underpinned by the goal of maximising economic benefits to be accrued from the internationalisation of communications. Change has, nonetheless, been gradual and uneven across the European communications sector, and has been most radically witnessed in telecommunications (Thatcher, 2001, Humphreys, 2002) and exemplified by the growth of independent National Regulatory Authorities across the EU, whose task is to ensure that the Common Communications Regulatory Framework agreed at EU level (European Parliament and European Council of Ministers, 2000) is satisfactorily implemented. Here, the European Commission plays an important supervisory and coordinative role and may be regarded as an agency of the state, often its principal agent. Even more radically, Member States have agreed to remove, wherever and as soon as possible, sector specific telecommunications regulation, such that relevant issues would, when appropriate, be dealt with under general legal provisions, most notably competition and consumer protection law. The EU, then, as an international regional governance space with significant regulatory powers provides, not only a basis for negative coordination governance to occur in Member States, but may also, we argue, be a site of a transnational variant of negative coordination in certain cases.

However, it is important to note that the process of globalisation - though motivating in state behaviour the pursuit of common goals, such as liberalisation - has not produced an identical pattern of policy change. Eyre and Sitter (1999) have produced a taxonomy of different styles of regulation. Here, they argue that the U.S. employs a legalistic model with little room for discretion; the UK is characterised by an administrative style which operates on the basis of negotiation; Germany, by contrast exhibits a legalism somewhat similar to the U.S. but has a much stronger emphasis on both social and economic policy goals. With regard to the EU, they note a legalistic regulatory system underpinned by initiatives such as the pursuit of the Single European Market but also in part stemming from limited resources to act and problems over legitimacy and trust which the EU often faces. Eyre and Sitter also note that EU Member States regulatory systems are developing “in the shadow of the EU regime” and are, as a consequence, significantly influenced and shaped by it (Eyre and Sitter, 1999: 64-65).

The Internet and e-commerce conducted across it, emerged - separately from traditional telecommunications networks - during the above process of quite radical ongoing changes, and became, we argue, a prime case for fashioning a system of governance in this manner, in line with the new policy priorities of the current era of economic globalisation. As we illustrate below, this has had an important bearing on the character and detail of the still very much emerging pattern of e-commerce governance within the EU.

The Development of the EU’s Approach to E-Commerce.

The EU had begun to develop, with considerable success, a series of policy initiatives in the communications sector since approximately the mid 1980s. Changes in the fundamental cost structures of the telecommunications sector - particularly in respect of research and development - combined powerfully with neo-liberal arguments urging the relinquishment by the state of control over the telecommunications sector through national and international marketisation and economic liberalisation policies. These arguments and their strategic manifestation were first evident in Europe in the pioneering telecommunications reforms of the UK Conservative government of the 1980s, though they gradually gained currency and (for some, resigned) acceptance throughout the EU by the early 1990s. Within the new and uncertain telecommunications environment, the EU served for its Member State governments as a way of creating a policy context within which greater European inter-national harmonisation could be achieved, international competitiveness developed and a strong collective negotiating hand in global trade fora (in particular) created. As a consequence, the EU level gained in importance as a communications policy context.

The growing importance of Information and Communications Technologies in the social, economic and political life of Europe’s citizenry assured that the pursuit of the somewhat spuriously named Information Society or Information Age (see May, 2002) became a policy goal of the EU by the mid-1990s. The much-referred-to 1994 Bangemann Report laid out the basic policy architecture to be created for the realisation of the European Information Society and since then the EU has launched a series of policy initiatives in this vein (see Dai, 2000). Whilst the Internet and its governance were vital and burgeoning policy issues for the USA by the early-to-mid 1990s (see Mueller, 2002), the Bangemann report’s acknowledgement of it was tentative and oblique, reflecting the EU’s preoccupation with the development of

Integrated Broadband Communications Networks from the “traditional” telecommunications fixed network technological trajectory (see Werle, 2002). However, as the latter part of the 1990s progressed and the potential commercial significance of the Internet became clear, the EU made strident efforts to gain a policy foothold in evolving global arrangements for its governance (see Christou and Simpson, 2004). Equally important, within Europe itself, Internet policy goals began to assume an increasingly significant part of the EU’s Information Society programme. In 1999, the European Commission launched the eEurope initiative, endorsed by the EU’s Heads of State, at the European Council meeting in Lisbon in 2000 and developed over two phases, the second of which is due to end in 2005. Phase One of eEurope set three objectives, two of which referred directly to the development of the Internet in Europe including the promotion of e-commerce³ (European Commission and European Council of Ministers, 2000). The second phase of the initiative, *inter alia*, has the goal of creating a dynamic environment for the growth of e-business through developing the Single European Market in Information Society services, as well as a series of non-legislative self-regulatory measures related to stimulating business and consumer confidence and security in the electronic trading environment (European Commission, 2002a).

However, it was in 1997 that the EU’s intention to devise and implement a policy package to stimulate e-commerce - not least through the passage of legislation - became apparent with the presentation by the European Commission of plans for an *Initiative in E-Commerce* which advocated policy activity in a range of diverse areas, such as technical standards, intellectual property harmonisation, security, privacy, taxation, digital signatures, electronic payment mechanisms and even the somewhat distinct area of the liberalisation of telecommunications infrastructures and services (European Commission, 1997a).

In governance terms, e-commerce (particularly Internet based e-commerce, as opposed to the original closed user group, fixed telecommunications network-based, business-to-business variety) was a new, complex and poorly understood activity for the EU and its Member States alike presenting uncertainties regarding possible approaches to be taken. Given the newness of the Internet and its origins in US IT and communications research and policy, no EU Member State had developed a policy tradition in this area of communications, in sharp contrast to those in both telecommunications and broadcasting. The potentially global nature of the Internet and commercial activity pursuable across it further added to the uncertainty - nation states in Europe had, by the 1990s, become acutely aware of the need to re-think policies in sectors characterised by global(ising) economic activity.

For the EU, the e-commerce policy area presented an opportunity, which the European Commission, often regarded as a purposeful opportunist (Cram, 1994), became readily involved in. Like in the globalising telecommunications sector, the EU could provide a very useful context in which the most appropriate regulatory conditions for the development of e-commerce across the EU could be devised and a concerted European position in global fora dealing with salient issues vaunted. However, in the late 1990s, a major communications policy question concerned exactly how the governance of e-commerce markets would be dealt with by the EU. In the aftermath of the publication of the *Initiative in E-Commerce* document, the European Commission presented a proposal for a *Directive on Certain Legal Aspects*

of Information Society Services, in particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce) (European Commission, 1998). Several elements of the origins of the proposed directive gave a clear indication of the likely approach to be taken by the EU to e-commerce governance, since this directive was to be its centrepiece. The directive emanated from, and was led by, the Internal Market Directorate of the Commission, rather than its Information Society Directorate which was responsible for telecommunications and IT and here played only a relatively minor role. Though not unusual in the history of EU communications policymaking (see for example initiatives in broadcasting policy), this leadership ensured that the initiative was focused from the outset on commercial issues, notably the creation of a single European market in electronic commerce.

In its work, the Commission was very much aware of the novel nature of e-commerce and was keen to ensure that no disruptive or retardive legal obstacles to its growth and functioning would be put in place (authors' interview⁴). This very much chimed with policy thinking on Internet governance at the global level, where those at the helm of events - notably the US government and the US Internet technical community - were keen to ensure that "old order" regulatory interests from the telecommunications sector, such as the International Telecommunications Union, in particular, were kept at arm's length from emerging governance arrangements (Mueller, 2002).

The period around the proposal of the Directive on E-Commerce was also one of wholesale re-evaluation by the EU and its Member States of the regulatory approach to be taken to the ICT sector, in the light of the apparently inexorable convergence between the component parts of ICT - principally IT, telecommunications and broadcasting - and exemplified in the functional characteristics of the Internet. A controversial Green Paper on convergence produced by the Commission in 1997, put a number of options to Member States regarding the possible re-configuration of ICT regulation to the EU level in a more convergent manner, one of which - the most radical - was the creation of a new common system of regulation for all ICTs (European Commission 1997b) which would have included new policy areas such as e-commerce and the Internet. The Green Paper was the precursor to a lively and somewhat fractious consultation period in which it became clear that European broadcasting interests in particular - those of broadcasters and viewers alike - were opposed to the creation of any converged regulatory regime at EU level due to the sensitivity of communications content issues on cultural grounds in particular (see Simpson, 2000). The subsequently rather modest common communications regulatory framework agreed by EU Member States in 2002 thus dealt with communications infrastructure issues alone - principally a telecommunications affair - and excluded any content laden communications services. Very significantly, this criterion meant that e-commerce services - being content rich - were excluded from the common communications regulatory framework though for very different reasons than those related to the broadcasting sector's exclusion. As a consequence, though related to the other two, e-commerce governance policy at EU level has developed along a separate and rather distinct path of its own.

The Features of the Electronic Commerce Directive.

The political-economic context within which the Electronic Commerce Directive was developed had, naturally, a very significant bearing on its tenor and content, where both have contributed to e-commerce governance developing as a series of

commercial policy, rather than communications policy, issues. The EU and the European Commission in particular, took pains to ensure that no legislative measures were put in place which would later have to be revised due to unforeseen developments (authors' interview at the European Commission). This, in tandem with trends in transnational European negative coordination governance apparent at EU level resulted in the creation of the Directive on E-Commerce as a framework piece of legislation, imbuing it with flexibility, but also ambiguity. It is also important to note that the directive by no means encapsulates all the salient issues at the core of developing a governance system for e-commerce across the EU, such is its complex nature (see below). The directive is motivated by the consideration that the "development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal [European] market, which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from legal uncertainty as to which national rules apply to such services" (European Parliament and European Council of Ministers, 2000: paragraph 5).

Given its origins and aims, the centrepiece of the directive is its internal market clause which enshrines the right of information society service providers to freely provide their services across the EU. However, there are important caveats allowing Member States to derogate from this provision. They can so act in the interests of public policy⁵, to protect public health, public security and consumer interests, though the European Commission will scrutinise any such action and if necessary, can bring the matter to the European Court of Justice. Very importantly, the internal market clause of the directive is underpinned by what is known as the country of origin principle, which means that in respect of any disputes which arise between parties to an e-commerce transaction, the matter is dealt with in the jurisdiction of the supplier of the service. This principle caused a considerable degree of debate between Member States during the passage of the directive due to the fact that it appears to contradict the principles of private international law, as well as the Brussels and Rome conventions (authors' interview with a member of the European Parliament), to which we return in the next section. The rationale for the use of the country of origin principle is that it makes commercial life much easier and certain for service providers, since they only need to comply with laws in their place of commercial establishment and was deployed in order to encourage the growth of e-commerce service provision, since use of the country of destination principle could act, arguably, as a disincentive to entry into e-commerce service provision.

The Directive also set out a series of basic information requirements to be placed on providers of e-commerce services to do with ensuring clarity and probity in the behaviour of service providers. This part of the directive requires Member States and the European Commission to "encourage professional associations and bodies to establish codes of conduct...to determine the types of information that can be given for the purposes of commercial communication" (European Parliament and European Council of Ministers, 2000: Article 8). Section Three of the Directive deals with issues arising from the development of electronic contracts. It is incumbent on Member States to create the legal conditions whereby these can be drawn up and executed; a series of stipulations regarding the information service providers must give to other parties to an electronic contract is laid out. A very important aspect of the directive deals with the liability of e-commerce intermediary service providers

and, once again, efforts were made to create as light-touch an environment for these organisations as possible, to ensure that they were not disincentivised from entering the market. Here, in terms of the roles of offering “mere conduit”, caching and hosting services, a series of clear protective measures for intermediaries and their liability are laid out. There are, however, important conditions placed on the behaviour of intermediaries to do with their required passivity and obliviousness regarding any illegal content which they carry, cache or host. The controversial nature of this protection is further complicated by an apparent series of protective clauses for Member States regarding each of these activities, to the effect that the condition of protection afforded to the intermediaries does not “affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement” and in the case of hosting services, additionally, allows Member States to create procedures to “govern the removal or disabling of access to information” (European Parliament and European Council of Ministers, 2000, articles 12-15).

An important part of the Directive deals with a system for its implementation. Here, the use of self-regulatory codes of conduct are encouraged and Member States are required to ensure that their legislation does not impede the growth of out-of-court dispute settlement systems. The Directive also addresses the modalities of such systems in terms of guarantees to the parties involved and the need to inform the European Commission of significant decisions taken as part of their operations, though Member States are merely “encouraged” to ensure that appropriate measures are taken. In line with the principle of subsidiarity, it is left to Member States to determine sanctions to be applied in cases where the directive’s nationally translated provisions are infringed and to ensure enforcement of them.

The Broader “Policy Nexus” of Developing EU E-Commerce Governance.

Whilst the passage of the Directive on E-Commerce was a manifestation of the EU’s attempt to develop an, albeit embryonic, system of governance for e-commerce, the complex nature of this policy area has meant that a broader set of “ancillary” legislation has either been developed from scratch or adapted from related existing non e-commerce legislation. This has arisen, in part because of the need to develop what are seen as specific supporting measures to encourage the growth of e-commerce, but also, very importantly, because of the decision to develop e-commerce governance within a general competition/commercial policy environment. Consequently, a quite complex policy nexus for e-commerce is developing at EU level, of which the Directive on E-Commerce is just one - albeit important - part. A Commission official has noted that “the legal framework on e-commerce in the EU..is big building blocks being put together, sometimes addressing one issue, [and] preserving others” (authors’ interview). It is important to note that, at the time of writing, there has been very little direct testing of the robustness of the EU’s framework in practice, most notably in case law. Whilst a detailed examination of each of these policy areas goes beyond the scope of this paper, it is nonetheless important to provide an outline of the framework, to appreciate where the Directive on E-Commerce sits within the EU’s policy portfolio and its consequential significance.

The EU has undertaken a number of measures in the area of promoting the security of communications networks with a view to making e-commerce more attractive to potential consumers (European Council of Ministers, 2003; European Parliament and European Council of Ministers, 2003a). It has also developed work to address the issues of illegal and harmful content on communications networks (European Parliament and European Council of Ministers, 1999a; 2003b; European Council of Ministers 1997). The EU has developed several other policy lines specifically related to smoothing the conditions for the growth of e-commerce in Europe in relation to: consumer protection (European Council of Ministers, 1999) in particular in relation to distance selling activities (European Parliament and European Council of Ministers, 1997); the introduction and regulation of electronic signatures (European Parliament and European Council of Ministers, 1999b); the conditions relating to transactions utilising electronic payment methods (European Commission, 1997c); and the introduction of alternative dispute resolution methods into e-commerce, which the Commission has described as a “political priority” (European Commission, 2002b: 1).

Work in the area copyright protection was begun around the same time as the Directive on E-Commerce was being developed, the two areas considered to be closely related (European Parliament and European Council of Ministers, 2001). However, the area of copyright protection has proven more controversial since, unlike issues related to the Directive on E-Commerce, EU Member States have developed distinct, often contradictory, approaches historically (authors’ interview at the European Commission). In a similar vein, the EU has endeavoured to put in place a common agreed system for data protection, many of whose issues impinge upon the act of undertaking electronic transactions (EU Data Protection Working Party, 2003a; 2003b; European Parliament and European Council of Ministers, 2002; European Commission, 2003a). Here directive infringement proceedings have been taken by the European Commission against a number of Member States at the European Court of Justice and, in the extra-European international context, differences of approach to data protection have exercised the minds of EU and US policymakers, resulting in the compromise interface “safe harbour” agreement (see Farrell, 2003).

There is little doubt that growth of policy areas like alternative dispute resolution mechanisms exemplifies the emergence of negative coordination governance in EU policy, where proceduralism and legalism predominates. The EU’s approach to treating e-commerce more as a set of issues related to general commercial policy rather than sector specific communication policy illustrates the goal of creating as economically liberal an environment as possible. To date, however, it does not appear to have resulted in any simplification in the development of appropriate regulations to cover the sector. An important early controversial area has been the conditions of contractual responsibility, in the context of creating a common internal market for e-commerce in the EU. Here, the central issues have been, on the one hand, how existing general law in this area might be applied to e-commerce and, on the other, the extent to which the relevant provisions of the Directive on E-Commerce are compatible with these general specifications. In 1998, the EU passed a directive (which extended the provision of an existing 1983 directive) - on notification requirements placed on Member States for the purposes of transparency to secure the free movement of goods throughout the EU - to the field of Information Society services⁶(European Parliament and European Council of Ministers, 1998). As a

consequence, it is now incumbent upon all EU Member States to notify to the Commission any draft rules which are to be developed relating to such services. The primary aim in relation to the provisions of the Directive on Electronic Commerce is to ensure that its internal market clause (and its underpinning country of origin principle) are upheld such that “once a service offered in a Member State respects the laws of that Member State, it can benefit from the legal certainty of circulating freely throughout the European Union irrespective of the laws of the other Member States (European Commission, 1998: 1).

Up until 2002, the European Commission received a total of 70 such notifications from Member States, 20 of which relate directly or indirectly to e-commerce, though none have proved controversial. The lack of detailed knowledge in EU Member States on issues of e-commerce is reflected in the Commission’s claim that “there have been practically no reactions from the Member States [from notifications from other Member States], which have submitted observations in only nine cases. But above all, no Member State has submitted a detailed opinion” (European Commission, 2003b: 15). One area where Member states have fallen foul of the Directive concerns their failure, in a number of cases, to give prior notification of their intention to pass a piece of legislation in respect of an Information Society service⁷. Tellingly, the Commission has noted that it has not “received any objections [regarding Member States’ failure here] from economic operators, probably because of ignorance of the extension of the scope of Directive 98/34/EC to include Information Society services” (European Commission, 2003b: 26).

An important area of legislation at EU level which raises issues for the conduct of E-Commerce and, in particular, the stipulations of the Directive on E-Commerce, concerns the law applicable to jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (known as the Brussels Convention (1968)) and, secondly, the law applicable to contractual obligations (the Rome convention). The EU has recently begun a process of updating each. Whilst complex areas of the law in their own right, EU policymakers became aware, in the process of updating the conventions, of the need to take into account developments in e-commerce. In the 2000 Brussels Regulation - which relates to both contractual and non-contractual matters - it is stated that, apart from in legal disputes relating to insurance, consumer contracts and employment where the weaker party has the choice to decide in which jurisdiction the case in question is heard - cases will be dealt with in the court of the defendant’s domicile (European Council of Ministers, 2000: paragraph, 13). This raised the possibility that certain claimants would indulge in “forum shopping” and led to work attempting to address what is in legal terms known as the conflict of laws across the EU, the aim being to reduce as much as possible the potential to “forum shop”. As a consequence, in 1980, EU Member States signed the Convention on the Law Applicable to Contractual Obligations, known as the Rome Convention, which entered into force only in 1991, in the form of an international treaty (European Commission, 2003c).

Given the fact that no similar Convention was created regarding non-contractual obligations, the EU is working, at the time of writing, towards the production of a convention on non-contractual obligations in civil or commercial matters, known as Rome II. The idea is that, as a consequence, the Brussels and Rome conventions will be fully complementary to each other. Article three of the draft Rome II proposal, in

an effort to provide legal clarity, states that, in circumstances of a legal dispute, “The law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred” (European Commission, 2003c: 34).

Very importantly therefore, the Brussels and draft Rome II Regulations have direct implications for e-commerce in that disputes arising therefrom would in many instances be heard in the country of destination of the service. As our analysis of the provisions of the Directive on E-commerce above has shown, this directly conflicts with the Country of Origin principle at the heart of the Directive’s approach, in the case of a cross-jurisdictional dispute. This contradiction has caused considerable consternation and debate within the EU and at Member State level and is, at the time of writing, unresolved (authors’ interview with a member of the European Parliament). It certainly threatens to scupper the efficacy of the Directive on E-Commerce, though as yet no case law has arisen to test the situation.

The area of financial services is considered to be one of the most well developed in the domain of e-commerce and one which has been given specific treatment as part of the EU’s creation of an overall governance package for e-commerce. An important issue has concerned a state’s ability to employ the derogations to the internal market clause of the directive in the case of financial services, in particular in respect of the need to protect investors (European Commission, 2002c), which has been a particular problem for several Member States. In response, the European Commission has addressed the issue in a paper which examines how existing EU case law might be applied by Member States to electronic financial services, since, given the relative newness of e-commerce, no specific legal precedents currently exist at EU level in this regard (European Commission, 2003d). In an important Communication on the application of e-commerce to financial services, the European Commission highlighted its intention to develop a three-pronged policy framework, dealing with the creation of a more convergent rule environment for different aspects of financial services within Member States to facilitate the Country of Origin principle; a series of actions to promote consumer confidence in electronic financial services and, finally, the creation of a system of cooperation and monitoring between Member States and the Commission (European Commission, 2001).

The proposed strategy gives a clear indication of the likely governance practices to be developed in this part of the domain of e-commerce, which are likely to be extended to other areas. The central characteristics of this system are rule harmonisation and, ideally, homogenisation; the use of out-of-court dispute settlement mechanisms and, finally, a system of networked monitoring between governmental agencies at national and European level - principally, the European Commission and designated national governmental bodies - as well as a series of self-regulatory agencies across the EU. The Commission has termed these “legislative and co-regulatory” initiatives. These traits are the essential embodiment of new trans-European electronic negative coordination governance.

The Transposition and Implementation of the Electronic Commerce Directive: Finland, Germany and the UK.

The UK, Finland and Germany differ fundamentally in their political-economic history and development, and thus have differing traditions of governance, regulation and policy making in the wider sense, and also at sector specific level. In more recent years, globalization and European integration have provided an impetus for regulatory reform and served to promote the notion that national systems are moving to more convergent positions in order to be able to meet the challenges of the global political economy across several sectors. The telecommunications sector is a prime example of how national processes seem to be following comparable paths, in particular after the global liberalisation and privatisation of the sector and European Union legislation providing a common model and framework for regulation in the EU. Despite this, however 'different national traditions regarding institutions, ideas and actors...have induced important variations between different national regulatory practices' (Eliassen and Sjøvaag 1999: 4, see also Schmidt 2002).

With e-commerce the scenario has been rather different in terms of regulatory developments where ideas have been diffused down from the global level and adopted and modified at European level, with a relative lack of knowledge and governance traditions evident at national levels. In this paper, investigation of the national level and how the DEC has been received and transposed in our case study countries will allow an evaluation (albeit tentative, given the relative newness of the Directive) of how far the 'national intervening variable' has constrained or hindered the creation of a clear legal environment for the creation of an electronic internal market. We focus on the extent to which national institutional ideas and actors, as well as the nature of the Directive and the ambiguity of its underlying principles, are affecting transposition and early implementation.

The Directive on E-Commerce, underpinned by several key elements, notably the pursuit of a light and flexible framework, self-regulation, and the Country of Origin principle, has now been transposed to the 12 EU member states⁸, with further varying degrees of transposition for the countries that became members of the EU in May 2004 (European Commission, 2003e: 6-19). An analysis of the nature of the transposition of the DEC in all EU Member States is beyond the scope of this paper, and thus we cannot generalise from our conclusions. However, what we can do is point to potential problematic areas arising from the pre-transposition (consultation) and transposition stages of the directive and identify, in the context of our argument, issues that are pertinent to the approach taken to the emerging governance and regulation of e-commerce in Europe.

Finland

The Finnish approach to Information Society is characterised by co-regulation where there exists a dynamic relationship between business and society, with a mediation role taken on by the state. The Finnish state has been a key stimulant to the performance of Finnish business in the ICT sector in several ways. Most important however, has been the reform of the Finnish regulatory environment by the state, through deregulation, liberalization and privatisation to facilitate the entrepreneurial and networking capacity of business, whilst also actively supporting innovation through funding and the higher education system, geared toward information

technology. The state has also contributed to a stable system of industrial relations ‘creating the conditions under which social partners representing capital and labour could agree on a strategy of competitiveness that would integrate workers’ concerns and workers’ rights’ (Castells and Himanen 2002: 140-145).

Finland is one of the most technologically advanced countries and is arguably a leader in ICT development. Statistics available (International Data Corporation’s Information Society Index) suggest that Finland has held a leading position in Internet uptake, along with the United States, according to the number of hosts per capita and the number of Internet users as a share of the population. The information technology cluster in Finland has certainly been a major contributor to the dynamic growth of the Finnish economy in the last five to ten years – with leading companies such as Nokia and Linux being major players in the global ICT marketplace (see Castells and Himanen 2002: 11).

Statistics on e-commerce and Internet use by enterprises in Finland demonstrate that there has been an increase in the use of the Internet by enterprises since 1999. The Internet was most commonly used in wholesale trade, business services and post and telecommunications, in which 98 to 99 per cent of the enterprises had Internet access. The least frequent users of the Internet were enterprises in hotels and restaurants, transport, construction and motor vehicle sales (84 to 88 per cent of enterprises). The overall values of Internet sales amounted to EUR 3.4 billion in 2002 – with 85 per cent coming from sales to other enterprises. Domestic sales accounted for about 80 per cent of all Internet sales (Statistics Finland 2003).

E-commerce Regulation and the DEC

The Finnish governmental perspective on how e-commerce should be regulated and governed is that ‘it should not be treated any differently to [offline] commerce’ (authors’ interview, Ministry of Transport and Communications, 2004). It is also the overall view of the Finnish government that the DEC should be as liberal as possible, regulated by the market and not dictated by government – although the government did have a strong facilitative and collaborative role – consistent with the general approach to ICT. From the Finnish governmental perspective there were no specific problems relating to the Internet or distance selling prior to the DEC proposal. Finland already had strong consumer protection law that actually went further than what was in the DEC and it seems that there was no great enthusiasm for new legislation for e-commerce amongst business, consumers or the authorities (the perspective in Finland was still that no special regulation was needed for business to business e-commerce).

The Ministry of Justice had the main responsibility for the transposition of the Directive, as it contained matters that fell under its remit including private international law, electronic contracts and liability rules. There was also close liaison with Ministries involved in the negotiations, principally the Ministry of Transport and Communications. Others to be kept informed were the Ministry of Education which had an interest in copyright matters and the Ministry of Trade and Industry which had a general interest because of the nature of the Directive. Interestingly, out of the three case study countries, Finland was the only country where the Trade or Economics Ministry did not have the central responsibility for transposing the Directive.

The most fundamental aspect of the DEC in Finland was the legislation on 'liability of intermediary service providers' (Articles 12-14) where no specific Finnish legislation existed on this issue. The Fins perceived that all other aspects of the directive to be relatively unproblematic because of already existing substantive consumer protection legislation embedded in Finnish law and the view that business to business e-commerce did not require any specific or special regulation. However, it was also clear that the provisions of existing Finnish rules and laws meant that Internet Service Providers were exempt from liability (provisions for mere conduit and caching existed in Finnish law). Consequently, from a Finnish perspective, the DEC was not of great importance as it was very clear that most aspects of the DEC were already covered or resolved by the existing common legislation (apart from hosting services where it was decided that conditions under which host providers are not liable should be specified).

The problematic issues identified during the pre-transposition negotiations on the DEC were the internal market clause (Article 3 of the Directive), and what this meant in practice, and the issue of liability and the rules relating to the liability of operators and other intermediaries and service providers. There was, and still seems to be, general confusion and a lack of clarity concerning the country of origin rule and its meaning. From a Finnish perspective, there seemed to be a lack of clarity in the way in which the country of origin rule was explained to Member States by the Commission, and on how, indeed, the rule would work in practice given the potential contradiction with the law applicable (private international law) in the Brussels and Rome Conventions (and the modified versions). From a Commission perspective the country of origin rule did not determine the law applicable - there was no contradiction - even though potentially, in certain areas, this seemed to be the case. The Finnish governmental position on this was that a clear line of demarcation should be established between private international law and the country of origin principle and that there should not be the option to choose the law in any particular case (authors' interview, Finnish Ministry of Justice, 2004).

The DEC was transposed mainly through the Act on the Provision of Information Society Services, as well as through minor amendments to three existing Acts: the Act on the Protection of Privacy in Telecommunications and on Information Security in the Telecommunications Activities, the Consumer Protection Act (78/1978) and the Act on Unfair Business Practices. By far the most salient issue during the transposition stage was that of liability, where there was a clear conflict between existing constitutional arrangements in Finland and how the Government should transpose the liability requirements of the DEC. It was the view of the Constitutional Law Committee of the Finnish Parliament 'that an amendment should be considered to the Government proposal according to which a court order would be required before the service provider would be obligated to prevent the access to information which infringes a copyright'. Indeed according to the Constitutional Law Committee of the Parliament the notice and take down procedure that was proposed by the Finnish Government (E-commerce Working Party) endangered the freedom of expression guaranteed by section 12 of Finland's Constitution⁹ (Kummoinen 2002: 5).

In light of this conflict a primary aim of the Finnish Government in the transposition was to reformulate the proposal to safeguard the freedom of expression as provided for in Finland's constitution. A specific concern of the Government in this respect was the obligation to the *host service provider* to remove illegal material to avoid

liability (Article 14). Thus, this was an aspect that was changed during the process of formulating the Finnish Act for transposing the Directive, and as much as half the Act is related to this issue. Furthermore, Finland used the possibility provided by Article 14 (3) to establish procedures governing the removal or disabling the access to information, and due to the creation of these procedures, the wording of Article 14 could not be followed verbatim.

Article 14 thus proved controversial throughout the preparation and transposition process in Finland, with different views as to how it should be transposed. A particularly salient dispute which essentially shaped the final nature of the Act was between the telecommunications sector and the copyright holders. The former held the view that taking down information or disabling access to it should always be based on a court order or injunction by another authority. The organisations representing copyright holders, however, wanted to include the possibility of self-initiative in taking down information and disabling access – in particular with regard to information received outside any formal notification or court orders. The view of the copyright holders also reflected the view of the European Commission, the latter of which criticised the Finnish government (E-commerce Working Party) for incorrect transposition and going beyond Article 14 of the DEC.

According to the European Commission, the Finnish proposal, and specifically the exemption to liability of the host provider, went beyond Article 14 of the DEC for cases other than infringements concerning sexual decency and incitement to hatred, since it did not take into account that there were other possibilities for the service provider to obtain actual knowledge or awareness of unlawful information besides court orders or notification from copyright holders. In addition, the view of the representatives of the copyright holders was that the proposal should be amended in such a way that actual knowledge could be obtained not only through a fixed-format notification but also through any other information that the service provider acquires of the existence of information infringing copyrights on the server (Kummoinen, 2002: 6).

In short, law was established in Finland to the effect ‘that it is not for the service provider to decide whether or not to take down material, but rather it is for the court to decide’ (authors’ interview, Finnish Ministry of Justice, 2004). However the Act also incorporated an alternative procedure for copyright infringements, to allow the possibility of quick intervention when an unlawful act is discovered. Overall, the Finnish aim was to create a regulatory system that would be relatively easy for host service providers and to ensure that there was as little ambiguity as possible. In the establishment of such a law there was clear evidence of policy learning from the US system, in particular the provisions of the Digital Millennium Copyright Act, the essential features of which are that the holder of the copyright has the right to demand that the information infringing his right is taken down and that the host service provider can rely on the notification and act according to it (Kummoinen, 2002: 7). Importantly, such an approach also meant that the Finnish transposition of the DEC with regards to hosting services would be unique amongst the Member States of the EU and thus specifically shaped by the national intervening variable. No other country, including Germany and the UK, interpreted Article 14 (3) of the DEC in such a way as to establish national procedures governing the removal or disabling of access

to unlawful information – indeed most have encouraged this only on a voluntary basis.

Regulation and Governance Patterns.

There are different views within the involved Ministries in Finland on regulating e-commerce. The Ministry of Transport and Communications supports a market driven view and industry self-control, and thus argues for less regulation. The Ministry of Justice on the other hand is, by its very nature, in favour of greater protection for consumers and more regulation in order to achieve justice for them. The responsibility for regulating e-commerce is divided into two elements. The Consumer Agency and Ombudsman deal with the complaints from consumers, and there is also a Consumer Complaints Board. In terms of the business side, there are no agencies directly responsible, but FICORA, the telecommunications regulator, does have a supervisory and oversight role to ensure that those trading online fulfil the information requirements set out in the law (and where this is a consumer question there is overlap with the Consumer Ombudsman). This involvement of FICORA, albeit in terms of a minimal oversight role, again is unique in terms of the regulatory patterns that we have identified amongst our case study countries, where Internet Commerce issues have clearly been excluded from the remit of the telecommunications regulators, because of its treatment as a commercial policy rather than a communications policy issue.

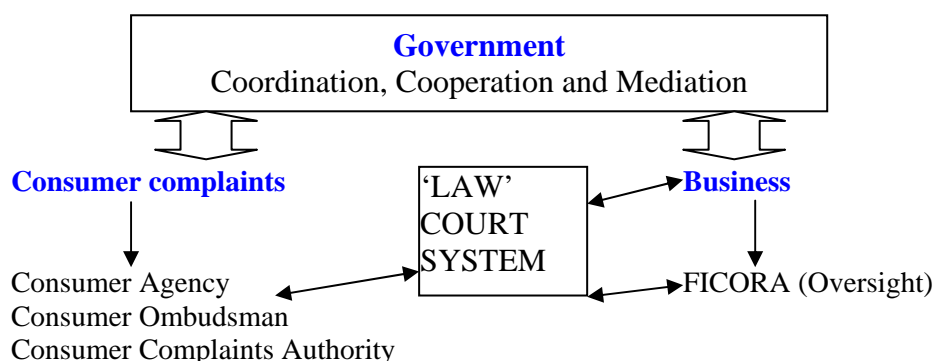
Finnish e-commerce governance measures have been subsumed into an amalgam of existing legal arrangements through amendment of existing Acts, as well as through the creation of a new Act. In terms of negative coordination, there are certain characteristics of this form of regulation or governance in the Finnish approach. There is an emphasis on legalism, process and procedure and independent agencies exist to regulate consumer issues. However, in terms of industry and business, FICORA only plays an informational rather than regulatory role with government providing a clear legal framework and infrastructure in which business can operate.

The Finnish approach is best characterised as ‘co-regulatory’ rather than a ‘self-regulatory’ in nature. Overall, liberalism predominates but with an emphasis on public-private coordination and cooperation, reflecting characteristic features of the broader Finnish polity, where the state plays a mediating role. Important in Finland with regard to e-commerce, is the separation between the treatment of consumers (which has traditionally been strongly regulated, with consumer rights firmly embedded in Finnish statute, and established independent agencies to implement policy) and the regulation of business (where the stance has been reflective of traditional commercial practice and the approach that no special regulation is needed for e-commerce). It is important to emphasise, overall, that the DEC was subsumed into existing practice in Finland with no new identifiable actors, mechanisms or agencies created to regulate e-commerce, a central reason for this being, as we have pointed out, that it was not perceived as a communications policy issue.

Finally, there is no evidence of trans-European network governance developing for e-commerce, despite the objectives of the European Commission to create transnational links and encourage transnational communication on e-commerce (apart from with

other Nordic countries where transnational coordination and cooperation has existed for many years).

Regulation and Governance: Co-Regulation-A Legalistic Approach



The United Kingdom.

The UK's approach to the development of e-commerce is co-regulatory (e-commerce@its.best.uk, 1999), although there is also a strong emphasis on and steer towards self-regulatory initiatives to be developed within industry, which can take several forms¹⁰. The UK polity is distinctly statist in nature and is characterised by administrative procedure, with fluid, fragmented and horizontally integrated policy networks (Schmidt 1999: 164). The UK model for e-commerce is that of closer coordination and cooperation between industry and government, in order to deliver a legal and regulatory framework that will ensure clarity for businesses operating online and engender trust amongst both consumers and business to facilitate the growth of the economic aspects of the knowledge economy. An important element of the development of e-commerce in the UK has been the government's general approach to the UK political economy since it was elected in 1997 aimed at creating a 'light regulatory environment'¹¹, enabling business to grow in the global electronic market place.

Electronic commerce is an important aspect of the UK government's vision for building a modern, knowledge-driven, economy with its aim, as set out in its 1998 Competitiveness White Paper, 'to make the UK the best environment in the world for e-commerce'. Although the UK has gone some way to realising its potential, it still lags behind leaders such as the US and Sweden, in terms of retail sales and buying online (www.e-commerce-digets.com). However, a survey conducted by the Economist Information Unit in July 2002 ranks Britain second, behind the Netherlands, in its preparedness for e-commerce in Europe. Figures from the UK show a positive picture for the growth of e-commerce in the UK. Surveys conducted by the office of National Statistics in the UK in 2002, show that UK businesses (excluding financial sector businesses) sold 23.3 billion GBP over the Internet – a rise of 39 per cent on the previous year's 16.8 billion (see <http://www.statistics.gov.uk/>).

E-commerce Regulation and the Directive on Electronic Commerce.

The Department of Trade and Industry (DTI) was mainly responsible for the transposition and implementation of the E-Commerce Directive (see below). The UK philosophy for regulation of e-commerce is liberal in nature, similar to the Finnish philosophy, although embedded in a different system of political economy that has been characterized by deregulation and liberalisation and since 1997, a modernisation agenda and a light regulatory touch approach by the Labour government. Subsequently the strategy of the DTI to e-commerce has been that no extra layers of regulation are needed for the Internet: 'it should not be regulated as existing legal and administrative frameworks for consumer protection and fair trading were in place that were on the whole adequate and applied equally well online as they did offline' (Interview, DTI 2004). It is also the DTI's view that there should be no discrimination between the different forms of media so that the law should apply to the Internet as it does to other media, unless the nature of the Internet specifically means that this it is not viable. The UK government treated e-commerce as a priority domestically, in terms of promoting best practice and helping to get businesses online. There was a push, as part of its modernising agenda¹², to enable new technology to change the way businesses operated. Given this context, the EU's Directive on E-Commerce was very much welcomed and supported by the UK to facilitate the provision of a clear legal environment for e-commerce, which it had begun to discuss prior to its origination. Electronic contracts and cross-border online transactions and services for example, had already arisen as key issues related to e-commerce in the UK (authors' interviews, UK DTI, 2004).

The majority of the DEC was transposed in the UK through the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No.2013), and came in to force on 21 August 2002. Regulation 16 of the Electronic Commerce (EC Directive) Regulations 2002 came into force on the 23 October 2002. These extended the Stop Now Orders (EC Directive) Regulations 2001 to include the consumer protection elements of the E-commerce regulations, which was subsumed into Part 8 of the UK's Enterprise Act 2002. The DEC overall was transposed in two parts: one covering general aspects and the other financial services aspects (implemented by the Treasury¹³ and enforced by the Financial Services Authority). The UK government tried to retain much of the flexibility of the DEC in its own transposition to UK law.

From a UK Department of Trade and Industry perspective, the major issues that arose during the negotiation of the DEC related to the country of origin rule and limitations on the liability of Internet intermediaries. The same issues arose during consultation (there were two consultations on the directive's implementation – one on general principles and one on the text of the UK's proposed regulation). There were particular problems in the implementation stage regarding the UK government's interpretation of Regulation 7 (Article 3 of the Directive) on the country of origin principle and Regulations regarding the limitation on liability of Internet intermediaries (Regulations 17-19 – Articles 12-14 of the Directive), which were regarded as overly and unnecessarily complex. Most of those responding to the consultation strongly favoured the country of origin approach, but the initial drafting of the UK regulations did not seem to reflect this approach, but rather a country of destination approach. This, it was argued by major commercial players, would create greater legal uncertainty and cause substantial harm to the development of e-commerce in the UK,

placing UK industry at a competitive disadvantage internationally, in addition. The subsequent UK Regulation was changed to more explicitly acknowledge the primacy of the country of origin principle. However, the UK government also recognises that this principle is open to challenge within the current UK Regulation, which is still 'rather silent on the issue' (authors' interview, DTI, 2004).

The most contentious issue was how to implement the Directive's provisions on limiting the liability of intermediary service providers. Whilst there were issues regarding specific wording (e.g. 'in damages'), definitions (e.g. actual knowledge) and exclusions (e.g. liability of providers of hyperlinks and location tool services), a particular debate that arose within the UK was whether notice and take down procedures should be implemented by industry self-regulation, or by statutory regulations, or some combination of both (similar to the Finnish case)¹⁴. The UK government has not embedded any form of notice and take down procedure in statute, but has taken a voluntary, self-regulatory, approach to develop codes of conduct for the removal of illegal material. The view of the UK government was that it did not want to build in any constraints from the start, but if the voluntary approach did not work then a statutory approach would be considered. On the liability of providers of hyperlinks and location tool services, it was the view of industry that these should be included in both the DEC and in the transposed UK regulations on e-commerce. As it transpired, they were not covered by either piece of legislation and remain a topic for review at both the European and UK levels.

Since implementing the DEC, the UK has had to exercise its derogation on the country of origin principle (the only member state that has had to do so) due to cases that have arisen with the Independent Committee for the Supervision of Telephone Information Services (ICSTIS)¹⁵ and the fraudulent use of premium rate numbers in the UK. Five formal notifications were made to the Commission by the UK regarding this problem, two of which made use of the emergency procedure provided for by Article 3 (5) of the DEC.

In 2003, ICSTIS took action against a Spanish-based company and a German-based company, both of which were fined £75,000 and £50,000 respectively. Access to both services was barred for a period of two years and both companies were also instructed to offer redress to complainants. The primary concern of ICSTIS was with the cost of connection to the websites run by the two companies (£1.50 a minute) which was incurred automatically without users' knowledge. Under the recently revised ICSTIS Code of Practice, unless permission to do otherwise is specifically granted by ICSTIS any, online services must not cost more than £20 in total. On that basis, the websites should have automatically disconnected a caller after £20 of call spend. However, the service continued to connect even when users tried to end the connection by clicking on the "close" icon on the window menu bar. Furthermore, ICSTIS argued that the automatic connection to the premium-rate service without the consent of users was a breach of the Computer Misuse Act 1990, the ICSTIS Code requiring premium rate service providers to comply with UK law.

Regulation 4(3) of the transposed DEC provides that requirements, such as those of the ICSTIS Code, shall not be applied to the provision of an information society service by a service provider established in a Member State other than the UK where its application would restrict the freedom to provide information society services to a

person in the UK from that Member State. On that basis, ICSTIS should not generally take action against non-UK companies. However, regulation 5 of the same legislation sets out a number of exceptions to the provisions of regulation 4. Under regulation 5(1) enforcement authorities such as ICSTIS may take measures which would otherwise not apply by virtue of Regulation 4(3), in respect of an information society service where those measures are necessary for, amongst other things, reasons of public policy (particularly the protection of minors). However, Regulation 5(4) requires ICSTIS, before it takes any action, first to ask the member state in which the service provider is established to take appropriate rectificatory measures. ICSTIS can then only take action if the local member state fails to take appropriate or adequate measures, and ICSTIS notifies the Commission and the local member state of its intention to take action. ICSTIS did not notify the Spanish or German authorities before it took action against the companies because it relied on a further exception, set out at regulation 5(6), which allows it to take measures against a service provider without first asking the “host” member state of the service provider, if the matter is one of urgency. ICSTIS relied on regulation 5(6) in taking action against the offending Spanish and German websites¹⁶.

The ICSTIS example illustrates exposed some of the practical challenges of a common legal framework to deal with cross-border infringements, particularly when those infringers are not located in the UK and where there is inadequate provision (infrastructure, regulation) in other EU member states to deal with abuse of premium rate numbers across borders (those using numbers that are not from their own national numbering scheme). It also highlights the need for flexibility in certain provisions of the DEC, so that independent bodies such as ICSTIS are allowed to directly tackle abuses within the UK by non-UK companies through the imposition of sanctions and the levying of fines, although enforcement of judgments might not be as straightforward. Problems such as this highlight the need for the creation of a some kind of European enforcement agency that can sanction and enforce across the EU space in a harmonised legal environment for the single electronic marketplace.

Regulation and Governance Patterns.

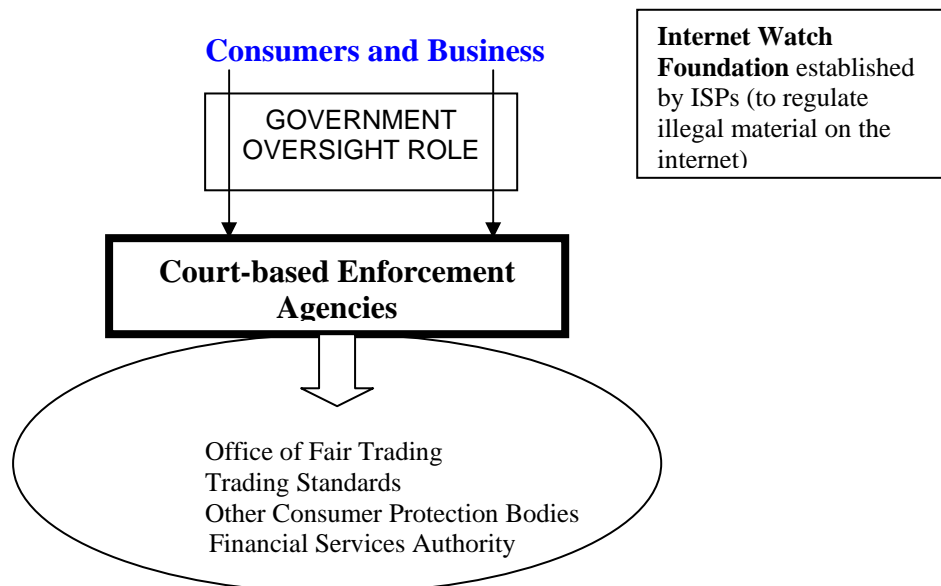
The UK government commissioned the Performance and Innovation Unit to produce a report on e-commerce, duly completed in September 1999. The UK’s vision for e-commerce, as outlined by the report, reinforced its commitment to open and competitive markets, and highlighted an approach that struck a delicate balance between a necessary degree of ‘light touch’ regulation and freedom to innovate. It also underlined the importance of demonstrating the power of industry self-regulation, backed by Government (a form of co-regulation).

Although no independent institutions have been established to regulate e-commerce in the UK, there is evidence of movement towards negative coordination governance. The emphasis is on self-regulation, with the focus of government on process and administrative proceduralism (as opposed to the Finnish legalism) directed at the regulation of e-commerce governance structures. In fact, the approach has been subsumed into the existing framework for commerce, with the business and consumer aspects being dealt with by the Office of Fair Trading (OFT) and Trading Standards, respectively. On the consumer side, through the transposition of the DEC, the OFT and Local Trading Standards were nominated as the enforcement body for the consumer protection elements of the Regulations. These have now been subsumed

into Part 8 of the Enterprise Act 2002, which allows the OFT, Trading Standards and any other named consumer protection bodies to make applications to the courts for enforcement orders to restrain persons from conducting infringing provisions of domestic and European consumer protection legislation. The courts will also be able to order businesses and service providers to publish corrective statements with a view to eliminating the continuing effect of past infringements.

The emerging regulatory regime for e-commerce in the UK can be characterised as co-regulatory, recognising that a totally laissez-faire approach to e-commerce is not capable of creating a secure commercial environment and a legal context where businesses, industry and service providers fully understand their liability. The UK approach involves a partnership between government and business, whereby government defines the public policy objectives that need to be secured, but tasks industry to design and operate self-regulatory solutions and stands behind industry ready to take statutory action if necessary¹⁷.

Regulation and Governance: Co-regulation—an Administrative Approach



A major difference with the Finnish approach is that this means that the emphasis on aspects such as codes of conduct is on the creation of voluntary measures, with the DTI retaining a discretionary oversight role, rather than a system being embedded in law or statute as it is in Finland. There is no evidence, as with Finland, of trans-European network governance developing for e-commerce, despite the objectives of the European Commission to create transnational links and encourage transnational communication on e-commerce. The DTI, however, has indicated its willingness to create a European level post-implementation group, to discuss key issues and problems relating to the Directive on E-Commerce (authors interview, UK DTI, 2004). There is evidence of a policy stance in the UK that that there should be no specific regulation of e-commerce (authors' interview, DTI, 2004) and it is notable that e-commerce was excluded from the remit of the new UK communications regulator, the Office of Communications.

Germany.

Germany operates in a distinctive political economy environment (see Schmidt 2002, Humphreys 1996, Steemers 2001), characterised by a split in governmental responsibilities between the Federal (national) and Laender (regional) levels. The German approach to ICT development and e-commerce, characteristic of its broader political environment, is one of cooperation and coordination between the major players in industry and society, reflecting the corporatist and consensual nature of the German policy making system characterised by 'thick' horizontal networks. Here, the Federal government has set the aim to create an environment that nurtures competition in order to step up development and use of innovative services in the public and private spheres and to shape the transition to a mobile information society. The paramount principle which underlines the German approach to e-commerce is deregulation before regulation, as outlined in the framework Federal Information and Communications Services Act (1997). More specifically, the German approach is liberal in nature, emphasising the need to define and provide a legal framework to enable economic growth and development. According to the World Economic Global Information Technology Forum 2002-2003, Germany improved its ranking significantly in the networked readiness index; jumping from 17th (in 2001) to 10th (in 2003). Germany also has more web sites per capita than any other country in the world around 85 per 1, 000 inhabitants as compared with 60 per 1, 000 in the US.

E-commerce Regulation and the DEC.

Transposition of the EU's Directive on Electronic Commerce is complicated by the Federal-Laender structure and consequent split areas of governance responsibilities, where the Federal level has control over telecommunications regulation and the Laender level governs broadcasting regulation. The Federal Ministry of Economics and Labour, through the Department of Commerce played the lead role in the transposition of the DEC, alongside other ministries, such as the Ministry of Justice, which was concerned with specific measures, such as the interpretation of the country of origin rule. The dual governmental structure in Germany creates a dichotomous system for the regulation of ICT, where the Federal level tends to adopt a less interventionist approach, in contrast to the Laender, which are often advocational of stricter regulation in their areas of competence (see Humphreys 1994, 1996). As in the case of other areas of overlapping governance responsibilities, the transposition and implementation of the DEC was characterised by legislative compromise between the Federal Government and the Laender.

Prior to the proposal of the DEC, Germany had already started to address and discuss the issue of the Information Society. One of the tasks of the Federal Council for Technology in Germany, set up by Chancellor Kohl in the early to mid 1990s, was to provide recommendations on the development of the Information Society and one of its key recommendations was to create a regulatory framework for new services, such as the Internet, in order to ensure its economic development. The origins of this recommendation lie in the conflicting perspectives of the Federal government and Laender on how to regulate new information society services. The Laender expressed a preference for regulating new services, such as the Internet, in the same hands-on way that they regulate broadcasting. The Federal government however, feared that if such an approach was taken it would stifle the development of the Internet economy

and thus prescribed a more minimalist, liberal approach, but, nonetheless, with the intention of regulating key aspects such as liability, transparency and the protection of consumers. The subsequent deliberations led to an assessment of the competences of the Federal Government and the Laender, and to the shaping of a new regulatory framework for multimedia services. This culminated, after protracted and difficult negotiations with the Laender, in the first ‘multimedia law’ (the Federal Teleservices Act, 1997 – article one of the 1997 Information and Communications Services Act) in Germany (Interview, Federal Ministry of Economics and Labour, 2004).

Both the Federal level, through amendments to the Teleservices Law, and Laender level, through amendments to the Media Services Interstate Agreement (which covers media services, notably broadcasting), have transposed the DEC into respective legal provisions. Germany was the only member state within the EU to have existing legislation on e-commerce through the Teleservices Law and the Media Services Interstate Agreement. Indeed, on close inspection, the DEC included many of the aspects of existing legislation in Germany, including provisions on liability of service providers, transparency and freedom of access. However, the Directive went beyond then current national provision on issues such as information and transparency requirements, as well as introducing new areas, such as conditions for electronic contracting and the country of origin principle (Teleservices Law 1997, see <http://iukdg.de>). There were no major difficulties in the transposition of the DEC into German law, precisely because of the fact that Germany had pre-existing legislation in these areas. However, as with the UK and Finland, transposition of the country of origin principle did cause some concern because of a lack of clarity underlying its possible interpretation and the difficulties this brought in understanding its full practical implications.

In Germany, the interpretation of the country of origin principle has brought into focus issues which can arise from split level governmental responsibilities. Although the Ministry of Economics and Labour has been established as a national contact point for other authorities wishing to take action against service providers in Germany, it does not have the regulatory responsibility or competence to act. This arises due to general implementation enforcement responsibilities lying in Germany at the Laender level and with RegTP (the telecommunications regulator) in matters concerning telecommunications. With regard to the ICSTIS case highlighted above, the UK has made complaints to the designated German Federal level national contact point which has necessarily resulted in forwarding of the matter to the relevant Land. However, since the issue of premium rate number regulation could be interpreted as a telecommunications matter, a debate has arisen over whether the issue falls within the remit of the Laender or the telecommunications regulator, RegTP (Interview, Federal Ministry of Economics and Labour, 2004). This issue – at the time of writing unresolved – illustrates a practical regulatory dilemma arising out of the definitional “fuzziness” of certain e-communications services, more of which will lie ahead should e-commerce become better established.

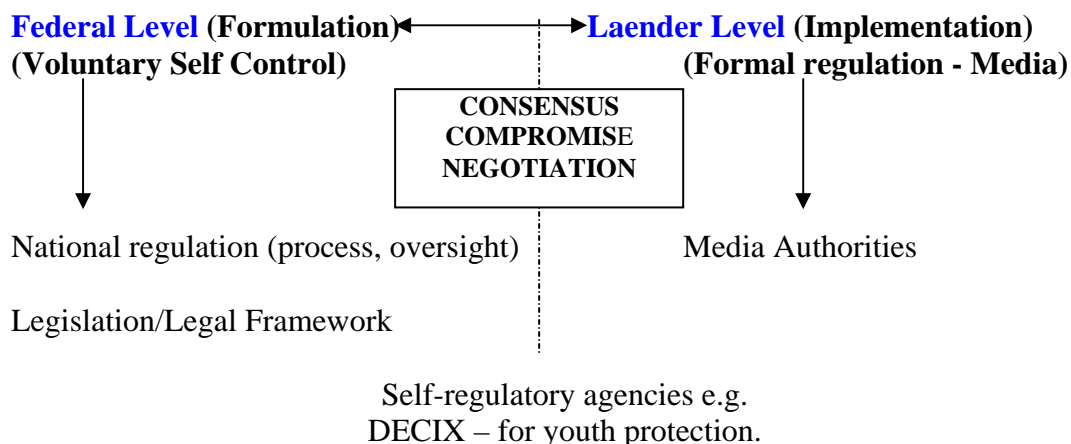
At a more general level, Germany has tended to transpose EU directives in their literal form into German law as much as possible to avoid any subsequent confusion. However, the wording of the Directive on E-Commerce has made this more difficult. and has caused problems in practice in terms of, for example, clarification sought by businesses on the exact nature of information requirements placed on them¹⁸. Overall,

however, because of the existence of the Teleservices Act, German businesses have had more time than many of their European counterparts to acclimatise to a considerable number of the provisions of the directive.

Regulation and Governance

The regulatory approach to e-commerce in Germany can be characterised as voluntary self-control, although such an approach tends to be unpopular with the Laender (which question its effectiveness) and which advocate instead formal regulation, rather than *self-regulation*. The view of the German Ministry of Economics and Labour, by contrast, is that voluntary self-control and self-regulation are more efficient and effective. Nonetheless, a continuing role for national regulation in a different form, with a concentration on ensuring the efficient functioning of *due processes* - for example, quality assurances for service providers and public service certification - is considered important by the Ministry (authors' interview, German Federal Ministry of Economics, 2004). Here, the emphasis is on industry to formulate its own self-regulatory codes of conduct, with governmental authorities playing a monitoring and oversight role.

Regulation And Governance: Legalism, Corporatism and Voluntary Self-Control



The national intervening variable is important in Germany, not so much in terms of the substance or content of the DEC because, as has already been noted, Germany had pre-existing law on e-commerce similar to it, but because of the regulatory philosophy imbued within it. Due to the Federal-Laender division of responsibility in Germany, a classic compromise has been the order of the day in the transposition of the DEC. Although compromise has led to transposition at both levels, implementation of the directive is the responsibility of the Laender, clearly creating a potentially problematic scenario given that they favour formal regulation over any form of voluntary self-control favoured by the Federal Government.

The German approach to e-commerce then - as in the other case study countries in this paper - is liberal in nature. E-commerce is treated as a commercial policy issue, with no responsibility having been given to the German telecommunications

regulator, RegTP, for its governance. This also occurs because e-commerce - being a content-laden service activity – falls exclusively within the remit of the Laender governments. Overall Germany's approach to e-commerce will be determined, for the most part, by the distinctive political economic environment which exists, where compromise, consensus, and coordination between the Federal and Laender levels is essential for any system to work effectively. As in both the UK and Finnish cases, there is little evidence of trans-European network governance developing for e-commerce.

Conclusions.

Our conclusions on the emerging pattern of e-commerce governance in the EU explored in this paper are broadly of two types: conceptual and policy-making. Conceptually, the treatment of e-commerce by the EU and its Member States is noteworthy in that a deliberate effort has been made to treat its governance separate from other parts of electronic communications. This has been explained in this paper through situating the emergence of the Internet (and associated commercial activities conducted across it) in the context of policy responses by states to recent and current globalising economic activities. The Internet, imbued with inherently global characteristics and expectations from the outset represented a tailor made case for operationalisation of these new governance approaches, many of whose features, we have argued, are recognisable in work on the regulatory state and negative coordination governance. The practical consequence has been that EU e-commerce governance is more like “commercial policy” than traditional sector specific “communications policy”.

For its Member States, the EU could be utilised in something of an agency role in a relatively new and poorly understood policy area and in the process has acted as a forum for a transnational version of negative coordination. Whilst the EU has produced some short term, sector specific (i.e. e-commerce specific) policy measures to stimulate its growth, the centrepiece legislative action - the Directive on E-Commerce - is a ground-clearing and foundation-forming mechanism for predominantly legalistic, partially self-regulatory, governance practices to be developed. As we have shown, the Directive is assisted by a series of more general “ancillary” legislation (in areas such as copyright, transparency, data protection etc..) which is consistent with the chosen approach. At national level, our case studies have illustrated an approach broadly co-terminus with the EU level, though the domestic politics context is creating variation in the detailed pattern of negative coordination governance in each case.

The national intervening variable has been important – particularly in Finland – where the transposition of Article 14 of the Directive on E-Commerce was unique, precisely because it conflicted with Finnish Constitutional values. In Germany national institutions were important for entirely different reasons - the issue was less about the substance or content of the Directive and more about how the distinct policy making environment here would impact on the efficacy of the Directive, given the distinct competences of the Federal and Laender levels. For the UK, the transposition seems to have been least problematic overall, with no identifiable conflict with UK regulatory philosophy or procedures. Nonetheless, the case of ICSTIS does demonstrate a potentially problematic area - not necessarily for the UK or because of the UK policy making environment - but more for the development of the single

European electronic marketplace. The generally liberal approach adopted to e-commerce contains strong elements of negative coordination governance, with an emphasis on process, legalism and an oversight role for government.

In policy-making terms, it is important to consider whether eschewing a traditional sector specific communications approach by the Europeans will result in more robust, efficacious and less complex system of governance for e-commerce across Europe. Unless the EU is quickly able to resolve the inherent conflict between the country of origin principle underpinning the internal market clause of the Directive on E-Commerce and the provisions of the Brussels Regulation and proposed Rome II convention, then considerable practical problems may lie ahead in resolving the legal disputes which will inevitably arise from cross-jurisdictional e-commerce activity. The country of origin principle is consistent with the EU's policy approach, developed since the Bangemann Report (and arguably before), of endeavouring to smooth the conditions for ICT business to flourish in Europe. The inherent assumption here is that what is optimal for the producer/service provider will inevitably be optimal for the consumer. However, one unforeseen policy consequence of aiming to deal with e-commerce in a non sector-specific legal context has been the calling into question of this assumption - a useful occurrence in itself.

As a framework piece of legislation, the directive on E-Commerce reflected a degree of practical policy expediency on the EU's behalf. Whilst it took almost four years to reach national statute books and become operational, the directive as a "framework" suffers, necessarily, from being broad-brush, thereby leaving scope for ambiguity. However, in the late 1990s, being a forerunner in the development of a governance policy for e-commerce was a priority for the EU, especially given the relatively minor role it played in the early years of global deliberations on future Internet governance and thus producing this policy initiative was considered imperative. Given the slower growth of e-commerce in recent years, the directive may, with hindsight, have benefited from lengthier deliberations. In its recent first report on the implementation of the directive, whilst stressing that the process has proceeded smoothly on the whole, the European Commission is keen to point out that it is still early days in the development of a system of e-commerce governance (European Commission, 2003e): an embryonic system has not been subject yet to sufficient testing by either the market or judicial systems. Whilst a network of national contact points has been set up to deal with issues surrounding the implementation of the directive, there is no evidence of a strong pan-EU network of policy coordination (authors' interviews) and monitoring (of legal and self-regulatory practices) which will be essential to develop if e-commerce becomes a more important part of the European economy .

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² See for example the TEDIS programme.

³ These were: to create a cheaper, faster and more secure Internet; to stimulate greater use of the Internet

⁴ A series of interviews was held, between January and April 2004, with officials with responsibility for the development of e-commerce policy at the European Union and in Finland, Germany and the UK.

⁵ Principally to prevent criminal offences from taking place.

⁶ The directive defines such services as “all existing or new types of services that will be provided at a distance by electronic means and on the individualised request of a service receiver” (European Commission 1998, 2).

⁷ Between 2000 and 2001, the Commission procedures of this kind.

⁸ France, the Netherlands and Portugal are the countries where the Directive had not been transposed although work was well advanced.

⁹ The Finnish Constitution is available in English at <http://www.finlex.fi/pdf/saadkaan/E9990731.PDF>. The opinion of the Constitutional Law Committee of the Parliament, PeVL 60/2001 vp, p.3, is available in Finnish and Swedish at www.eduskunta.fi.

¹⁰ See <http://communicationswhitepaper.gov.uk>

¹¹ See <http://www.dti.gov.uk/comp/competitive/main.htm>

¹² See <http://www.cabinet-office.gov.uk/moderngov/>

¹³ See http://www.hm-treasury.gov.uk/Documents/Financial_Services/Regulating_Financial_Services/fin_rsf_edirec.cfm?

¹⁴ See http://www.dti.gov.uk/industries/ecommunications/electronic_commerce_directive_0031ec.html

¹⁵ Under Section 120 of the Communications Act, Ofcom is responsible for setting the conditions under which premium rate service providers can operate, whilst ICSTIS is the body responsible for creating a Code of Practice and ensuring their compliance with it. On 15 July 2004, ICSTIS announced plans for new rules requiring premium rate providers to pre-register with the regulator before offering Internet dial-up services. See <http://www.icstis.org.uk/icstis2002/default.asp?Node=61>

¹⁶ http://www.legal500.com/devs/uk/it/ukit_119.htm

¹⁷ An example of co-regulation is the Internet Watch Foundation (IWF) which was formed in 1996 by the ISPs (a self-regulatory response) following discussions between industry, users and government. The IWF determines whether material reported to its hotline is potentially illegal. If so, it notifies the ISPs so that they can remove the material from their servers and also notifies the police, or, if the originator is abroad, to the enforcement agency concerned, via the National Criminal Intelligence Unit.

¹⁸ There was some dissatisfaction at the Ministry and from businesses with the informational requirements within the Directive on Electronic Commerce, because they indicated that a telephone number had to be supplied for customers. Many service providers however did not want to supply a telephone number, simply because they did not have the infrastructure to enable them to deal with telephone enquiries.