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HOW TO REGULATE INTERNET : NEW PARADIGMS FOR INTERNET GOVERNANCE SELF-REGULATION : VALUE AND LIMITS*

Yves POULLET**

« We should like to stress the State's vital obligation to intervene at a time when, in our opinion, deserting the Internet and withdrawing from the field of regulation to such a point that it no longer even decides the general framework, would notably put at risk public order, fundamental liberties and other basic values ».

Yves POULLET

PRELIMINARY CONSIDERATIONS

1. POSITIONING THE PROBLEM

In a recent Bibliography on self-regulation on the Internet, a report prepared for the OECD¹ stated : « while there is a broad consensus that self regulation of the Internet is critical to its future growth, there is little consensus about how to achieve and to implement a self-regulatory régime ». Self-regulation is a word and a myth : the concept is presented as an adequate solution due to the disintegration of traditional sovereignty paradigms (J. Reidenberg, 1996) on which the traditional regulatory powers given to constitutional State authority was founded. This phenomenon must be analysed in its context. Overtime, the functioning of the traditional constitutional bodies has been deeply modified to face the new challenges which have steamed from the development of the cyberspace and finally, we have to point out the important role of technical choices in order to rule

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1. See in the bibliography, the report quoted *Internet Law and Policy Forum*.

certain behaviours in cyberspace. Which relationships between these different regulatory methods ? And to what extent, is self-regulation developing peculiarities in the rule-making of the Global Information Society ?

The first part of this paper will identify the different regulatory techniques applicable to the Internet or generally to information superhighways; the second part covers the various responses in domestic and supranational law to these different regulatory techniques and envisages some criteria to enable the legitimisation of non law-based regulatory systems. Particularly, apart from a certain number of recent European texts, we will attempt to define the European position on the development of these new regulatory techniques and which request the status of legal rules.

CHAPTER 1 : THE VARIOUS REGULATORY TECHNIQUES ON THE INTERNET

A. On the diversity of regulatory models

2. PRELIMINARY CONSIDERATIONS

The goal of regulation is the prescription of behavioural norms. There is a great diversity of regulatory models and the norms can be divided into four categories according to their scope of application : the object, the author, the subject and the sanction of the norm.

We may note from the outset that the international dimension of the Internet leads to a certain “competition“ between different forms of national regulation. As soon as one country decides to regulate certain activities, the parties concerned by the legislation are free to move their activities to another country with a more flexible and less strict regulatory framework. This phenomenon of « regulatory dumping » is real (Y. Pouillet, R. Queck, 1997).

On the other hand, it must be noted that consumers prefer the security granted by a regulatory environment that takes better care of their interests. This second aspect should not be neglected.

3. SELF-REGULATION AND ITS MULTIPLE FORMS : AN ENUMERATION

It is impossible to name all the normative sources of law on the Internet. The public sources of law, the domestic and international norms stand in contrast with the private ones, i.e. the self-regulation. P. Trudel (1989) defines this concept as « norms voluntarily developed and accepted by those who take part in an activity ». Self-regulation encompasses a large number of concepts such as codes of conduct, model contracts, codes of ethics, memorandum of understanding, technical or administrative standards, certification or labelling systems. The technology itself (*cf. infra* n° 13) may equally have a normative effect on behaviour and might become a source of the Internet Law when the parties are contractually referring to it or when an authority imposes it as a *de iure* (or *de facto*) technical standard. Some authors see self-regulation as an emerging « *lex electronica* » parallel to the former « *lex mercatoria* » but developed within an electronic context.

We are facing a proliferation of such regulatory techniques, sometimes drawn up locally in a university or in a newsgroup, sometimes on a larger scale for a direct marketing sector or even for the broad mass of activities on the net (National charters). At a global level, the Internet Society, (a purely private organisation entrusted with assuring the international co-operation and co-ordination in technology and programming for the Internet), publishes directive guidelines for Internet and network use.

This self-regulation, including the standard setting process « affects fundamental public concerns and are no longer technical rules of purely commercial interest » (J. Reidenberg, 1996). This fact has been clearly recognised by the authors of the self-regulation. On that point, we would like to quote the declaration of the Internet Society president, V. Cerf, who affirms that : « It is no longer adequate to base guidelines for conduct purely on the basis of who pays for the underlying network or computer systems resources. Even if that was once sensible, the diversity of constituents of the Internet makes it a poor basis for formulating policy. Thus guidelines for conduct have to be constructed and motivated in part on the basis of self-interest. Many of the suggestions below are based on the theory that enlightened self-interest can inform and influence choices of behaviour » (V. Cerf, 1994).

4. SELF-REGULATION : FROM NORMS TO A COMPLETE LEGAL SYSTEM

As regards these private sources, we may observe that self-regulation is not limited to isolated norms but more and more encompasses a set of structured norms and provides not only contents but also the means to

enforce these rules. The actors themselves have developed means to ensure that the self-regulatory code passes from the letter to the act. The typical sanctions in the regulation of a network, such as disconnection and « flaming » remind strangely of vigilante justice. The hot lines created by certain codes of conduct to enable the denunciation of activities contrary to that code, represent another example of means set up to ensure adherence to network discipline. Some technical systems present a greater interest like the labelling and rating mechanisms developed by certain servers which both guarantee and inform the user on the quality of the service being offered (such as the « privacy friendly » label or the label of web sites of journalistic information referring to respect of the press code). Obviously, the value of such a classification depends on the quality of the certifying body that defined, issued and controlled it. It is appropriate to mention North American initiatives for the creation of « virtual magistrates », on-line arbitrators or mediators who are authorised to adjudicate conflicts arising out of network use, whether they be issues of defamation, intrusion into the private sphere or non-respect of the rules of a news group. Such alternative dispute resolution mechanisms have been recently promoted by the European Draft directive on certain legal aspects of Electronic Commerce in the internal Market (*infra*, n°19).

Hence, private regulatory sources set up their own mechanisms for laying down the rules, controlling their application and finally for sanctioning non-respect. In certain cases, penalties are delivered by their own « magistrates ». In the following lines, we will develop considerations on the various sources of self-regulation.

B. The State norm level

5. THE EMERGENCE OF MULTIPLE INDEPENDENT ADMINISTRATIVE AUTHORITIES

The State constitutes the legitimate authority for Internet regulation. The ways and means for the development of norms are meticulously described in the texts and procedures surrounding this development, thereby guaranteeing democratic discussion. The application of the norm is granted to « professional » jurisdictions, surrounded by guarantees of independence and a contradictory function.

With regard to « electronic environments » (P. Trudel, 1997), we can observe two distinct tendencies in government regulation. The first is a preference for notions of variable content, called standards, and the second is

the entrusting of the interpretation of these standards to relay bodies, sometimes qualified as independent administrative authorities. If we take the Belgian model as a simple example, the body responsible for dealing with privacy issues is the Privacy Protection Commission (Commission de Protection de la vie privée). The body responsible for the regulation of the audio-visual sector is the Higher Audiovisual Council (Conseil Supérieur de l'Audiovisuel) or the Media Council (Mediaraad), in the telecommunications sector the Belgian Institute for Post and Telecommunications (Institut Belge des Postes et Telecommunications) (Y. Pouillet, 1993). All these agencies have developed a proactive approach vis à vis the sectors concerned and elaborate different guidelines or recommendations with the input of the sectors. This phenomenon might be, according to M.E. Price and S. Verhulst (1999), considered as expressions of self-regulation even if it might be difficult to consider that, in those cases, the norms are elaborated voluntarily by the sectors themselves in fact they are issued rather with their input.

6.THE GROWING COMPETENCE OF THE INTERNATIONAL OR SUPRANATIONAL AUTHORITIES

The international dimension of information superhighways leads States to search, at the international level, for models to develop the law, or for co-operation among national authorities (B. Frydman, 1997). Through international conventions such as those of the UNO, I.T.U., W.T.O., W.I.P.O., O.E.C.D, bodies such as the G7, through treaties of police co-operation amongst States engaged in the fight against cybercrime (cf. the draft for an International Internet Charter presented by France to the O.E.C.D.), a number of public initiatives have been taken to maintain the role of the State in the protection and safeguarding of individual rights and of the public interest. Some (J.J. Lavenue, 1996) go so far as to suggest the creation of an « International Cyberspace Authority », in reaction to movements for the emancipation of Internet law and to the increasing power of private norms. The « Global Business Dialog »² promoted by former European Commissioner. M. Bangemann stressed the importance of setting up this global authority and fixing global rules for the electronic commerce.

2. The idea to have a global charter underlining the need for a strengthened international co-operation was expressed in September 1997 at the « interactive forum of the I.T.U ». Later, the European Commission has issued a communication (Feb.98) on the « Globalisation and the Information Society- The need for strengthened International Co-ordination» which aims to provide both a business dialogue, which should lead to the removal of all technical (including legal) barriers to electronic commerce and to ensure the political support and leadership in order to ensure a democratic legitimacy (<http://www.gbde.orgf>)

But, when such a solution is envisaged, the complexity of the functioning of the international fora and democratic deficit are frequently invoked. Nevertheless, due to the international dimension of the network of networks and the increasing need to define common rules, activity of international and supranational authorities is growing.

Moreover we note that these international fora are developing more and more alternative techniques of rule-making. Thus, the WIPO has issued guidelines for the attribution of the domain names and Internet addresses. The OECD is presently drafting guidelines for Consumer Protection in cyberspace.

C. The private norms level

7. SELF-REGULATION : A MULTIPLE JUSTIFICATION

The justification for this galloping self-regulation is triple³ : the technical and evolutionary nature of the object that the self-regulation has to cope with, the fact that only the authors are capable of perceiving the risks involved in particular solutions and assessing the adequacy and effectiveness of sanctions. The immediate clamping by access providers of a site denounced *via* a hot line mechanism constitutes a more appropriate and effective response to a pornographic site than any judicial condemnation (T.I. Hardy, 1994). The possibility of their development and expansion at a world wide level serves as a supplementary argument, at a time when the global dimension of cyberhighway problems is uncontested.

Beyond the establishment of norms, self-regulation claims to offer models for applying these norms to virtual communities, considered as distinct from spatial communities localised in a given territory and subject to state legislation. Over the past few years, we have discovered the role played by network « moderators », like « cybermagistrates », or virtual tribunals entrusted with the resolution of litigious issues in the virtual world. The creation of councils entitled to the application of Internet charters represents another demonstration of self-regulation's aptitude, not only to develop a supple system of law, but also to sanction it (H.H. Perritt, 1993).

3. For extended discussion, see particularly the introduction of the Dutch Code of conduct for the Electronic Commerce, available at <http://www.ecp.nl/> ; also, the extensive reflections proposed by P. VAN OMMESLAGHE (1995) on the need for self-regulation practices.

There is considerable temptation to see self-regulation as more than just a source of law complementary to that of the State, but rather as a replacement for the latter (D. Johnson, D. Post, 1996) or in any case to dispense the State from a meddling regulation. Accordingly, in certain cases, the private norm may take the place of a legislation : for example, the manner in which the delicate question of the attribution of Internet's domain-names is currently dealt with certainly argues a good case for the integrity and sufficiency of self-regulatory solutions (A. Wilkinson, 1998). In other cases, and the present debate between the U.S. administration and the E-U authorities about the Safe Harbour Privacy Principles is a good example, the code of conduct or the private norm, even if this self-regulation solution is promoted even requested by the public authorities⁴, may permit the latter not to set up an intricate and complex administrative and regulatory system which is considered as not useful beyond the vague legal principles already recognised by the Courts. (B. Gellmann, 1998). In other respects, without being naïve, we must realise that such a system of regulation by the parties themselves is far from being gratuitous. Operators are concerned by such measures either to side-step national legislation or to subject them to a « soft » interpretation, notably to avoid the prosecution. The debate on pornography via the Internet, arising from certain recent events, and the resulting proliferation of self-regulatory measures in this respect, illustrates this argument well.

8. CONTRACTS

Contracts is, as such, a way for contracting parties to self-regulate their relationships. It might also be a way for one party to enforce vis à vis the other a self-regulatory solution. In this second case, a code of conduct or another self-regulatory mechanism is integrated into the contract by reference as an integral part of the general contractual terms. As regards the first use of the contractual tool, it has been clearly asserted by a number of authors that the interactivity of networks gives the consent of the internet's user unprecedented implications. Today, the consumer has in fact the opportunity to give his/her consent on multiple occasions, such as to say yes or no to a cookie, to agree to a particular process, to reveal his identity or not, to object to non-solicited correspondence, etc. Whatever the issue, technology renders the netizen responsible for his or her actions (R. Dunne,

4. The Dutch Code of conduct is another good example of this «promotion» by the public authority insofar as the drafting of this code of conduct has been initiated by the Dutch Ministry of Economy who was present through representatives during the whole drafting process.

1994 ; P. Trudel, 1996). Conscious of the role played by contracts, some authors are tempted by the contractual paradigm and consider that State responsibility to regulate has been transferred to the responsibility of the citizen, who by his or her consent chooses to authorise, or not, an operation.

The principles of autonomous will and the law of covenant, unanimously recognised in every jurisprudence, give this approach, considerable weight. The contractual approach evidently requires that the technology permits such choices. Hence the questions : « does the Netizen wish to be identified ? for what purposes ? within which time limit ? » , must be the object of on-screen choice pages. The system's configuration must guarantee the respect of such choices.

The idea to incorporate self-regulation as an integral part of the contract is emphasised by the draft directive on certain aspects of e-commerce. Hence, Article 10 of the draft directive asserts the Internet Service providers have to provide an easy access to the code of conduct to which they subscribe and give to the internet users a possibility to store it and to reproduce it. For example, an Internet access provider might include in his general contractual provisions the self-regulatory norms under which the subscriber might neither send illicit or harmful messages nor unsolicited e-mail for commercial purposes.

9. CERTIFICATION

In a global environment where the network represents the sole means of communication, certification by which a third party guarantees the specific quality of a person or product appears an adequate solution.

The aim of certification is to assure the netizen of the existence and address of his interlocutor, and of his professional status. Beyond this, other questions arise with respect to the conformity of the other's products to this or that norm, on the respect of this or that privacy legislation, on the respect of consumer protection standards and, finally, with respect to the issue of the general security of the sites. Certification presents a solution which may be complementary either to a state normative source, or to a code of conduct or other self regulatory solution, inasmuch as it refers either to a law, or only or furthermore to a code of good conduct (D. Gobert, A. Salaün, 1999). Essentially it is based either on the quality both of the certifying authority (independence, expertise) and their verification procedures (quality of the audit) and either on the effective responsibility of these authorities in the event of an unwarranted issue of a certificate. Finally, certification permits easy and effective sanctioning, inasmuch as the company or individual fears

the loss of certification and the negative publicity that it would entail (Y. Pouillet- J.Royen, 1998).

10. SITE LABELLING AND FILTERING TECHNIQUES

Technology comes to the rescue of law. It is in this context that we can explain the tendency to develop labelling techniques (Webtrust, Trust-e), to introduce filtering systems such as PICS (Platform for Internet Content Selection) or to negotiate systems like P3P (Platform for Privacy Preferences). The idea is simple : every « data product » could be examined with reference to its conformity with threshold standards such as decency, non-violence, respect of privacy, consumer protection, etc. (for example, the label delivered by the Internet Consumer Protection Agency (ICPA) or by Trust-e which deals only with questions of conformity to privacy standards) of or certification of a more global nature (such as the « Webtrust » initiative developed by the Association of American Accountants).

Such labelling operates a priori in connection with filtering techniques enabling the netizen to select sites according to personal preferences, even to negotiate with these sites a peculiar protection or on the contrary, to abandon it (J-M. Dinant, 1997 and 1999; J. Reidenberg, 1998).

Labelling laws still have to be drawn up in order to answer questions such as what criteria would decide whether this or that site must obtain a label ? Can we even envisage a challenge of the criteria ? What degree of transparency must be expected from the criteria ? What will be the responsibilities of labelling authorities ? What legal recognition would be granted to such labels ? Which role does the State have to play as regards the recognition of labelling authorities ? And, finally, what kind of sanctions (private or public) should be imposed for failure to respect the conditions ? (on all these points, see Louveaux, Pouillet, Salaün, 1999).

11. BEST PRACTICES

Beyond the codified and well identified sources we have referred to so far, we must also deal with more diffuse principles which are to be found in the « Acceptable Use Policies » suggested by Internet access providers, the servers. This « Netiquette » is a set of « 10 commandments » or « highway code of fundamental rules for Internet surfers » (A. Rinaldi, 1995).

They comprise :

1. *You shall not use a computer to harm another person*
2. *You shall not interfere with another's work*
3. *You shall not ferret about in another's files*
4. *You shall not use a computer to steal*
5. *You shall not use a computer to bear false witness*
6. *You shall not use or copy a program for which you have not paid*
7. *You shall not use the resources of another's computer without authorisation*
8. *You shall not misappropriate another's intellectual creation*
9. *You shall envisage the social consequences of the program you are writing*
10. *You shall use the computer in a manner which shows consideration and respect*

As regards the infringement of these rules, sanctions may take the form of organised reaction such as : « flaming », disconnection of an indelicate user, threat of contacting the police etc.

The comparison between such practices, spontaneously developed by virtual communities, and the rules of conduct habitually practised by trading communities, leads to claims that « *lex electronica* » resembles « *lex mercatoria* » (B. Wittes, 1995). The similarity is attractive. Some authors (B. Frydman, 1997; J.N. Brouir, 1996) criticise the dominant economic debate as one which would « lead to the submission of the information society in general, and the activities of the Internet in particular, solely to the laws of the international marketplace ».

This parallel tends to lend authority to the considerations which will follow (*infra* n° 20 and ff.) on the role of government regulations in relation to these diverse regulatory techniques. Before analysing this role we wish to add a last remark on the role of the technology vis -à-vis the law.

D. Towards a *lex informatica*

12. ON THE INTERACTIONS BETWEEN LAW AND TECHNOLOGY

Technology can reinforce the effectiveness of law. Without such a reinforcement it would either become a dead letter or be poorly served by classic judicial procedures that are neither rapid nor effective. A site of the holocaust would certainly be better countered by mechanisms such as filtering or the clamping of its access, as envisaged by the « Internet

Charter » , than by the condemnation by a tribunal. E.C.M.S. (Electronic Copyright Management Systems), are more capable than legislation, at protecting an author's copyright. All these remarks support the opinions of certain authors (J. Reidenberg, 1997) that the so called « lex informatica » (that means the regulation by technical norms), is to be preferred to classical legal norms. One additional major argument in favour of these technical solutions is also that they provide a substantial « empowerment » of Internet users who are then able to ensure their own protection or through an electronic agent put at their disposal or operated by specialised companies⁵.

This legal/technological axis may be seen from two sides : on the one hand, the parties themselves are calling for legal measures to legitimise technical solutions and, on the other hand, the law is calling on the parties to take those technical measures (Y. Pouillet, R. Queck, 1997)

- Some examples of the role of legitimising technical solutions :

The electronic signature, (the first example analysed), demonstrates the need for security in commercial relationships on an open network such as the Internet and justifies service provider's requests for legal recognition of electronic certification services, or « Certification Authorities » or « Trusted Third Parties » such as Globalsign or Isabel, whose activities have already been legalised in some States (Utah, Florida, Germany, Italy) or are about to be in others. In the case of the electronic copyright administration services (Electronic Copyright Management Systems), the recent reform of the Berne Convention on author's rights criminalizes any attempts to outwit the technological protection systems offered by copyright management services.

- Some examples of law calling for the taking of technical measures :

The application of the principles of liability could lead a judge to sanction, in a civil or criminal suit, access providers and servers who have not taken acceptable and appropriate technical measures to prevent possible harm to clients using their services. It is in response to such fears and particularly the fear of a legislative intervention like the « Decency Act ») that American industrialists have developed the filter standard known as « Platform for Internet Content Sélection » (PICS) referred to above (*supra* n° 11). It is quite clear that the legislator sometimes has an interest to maintain high level standards of liability as a way to exercise pressure on the

5. Certain companies are offering anonymous remailer's services; others ensure navigation's service in order to select web pages not offending certain values; finally, companies might provide authors the benefit of E.C.M.S.

economic actors so that these actors will develop technological solutions in order to escape from their liability.

13. SOME REMARKS ABOUT THE VALUE OF THE « LEX INFORMATICA »

The trend to find within the technology itself the appropriate solution to compensate the present legal protection failure is fascinating. Nevertheless, we would like to emphasise two important dangers linked with these technological solutions.

Firstly, it is important to scrutinise very attentively if these technological solutions are in strict compliance with the legal norms and, beyond the text, with their fundamental aims. It is important that lawyers examine carefully if the « privacy », « copyright », « consumer protection », enhancing technologies are in strict conformity with the legal requirements as regard to the text and also to the spirit of the legal basis. That has not always been the case : thus, the E.C.M.S do not operate in the full respect of the equilibrium set up by the copyright legislation between the interested parties (P. Samuelson, 1999; Dusollier, 1999). The « privacy enhancing technology », such as the P3P platform defines the term of nominative data differently than the definition given by the European Directive and pays no special attention to the sensitive data (J-M. Dinant, 1999). The technique has to respect the law. This conclusion leads to argument in favour of a « techno-legal approach » that means that the lawyer must both favour the development of technical solutions enforcing legal solutions and at the same moment pay attention to the specific legal requirements in order to ensure these techniques will be fully compatible with those requirements.

Secondly, the technology aims at substituting the intervention of the public authorities for the protection of certain values, which might be dangerous. Thus, the P3P system would permit the user to negotiate (including against financial incentives) his or her right to privacy including no negotiable rights directly linked with fundamental liberties. The protection against harmful or illicit messages will be ensured by an electronic agent or by an information service provider and will be considered as a value added service that must be compensated financially. The citizen will be protected only if he is conscious of the risks and if he is able to pay for his protection. The citizen has to take positive steps in order to get the adequate protection, which supposes a certain intellectual ability.

14. ABOUT THE POSSIBLE CHOICE BETWEEN DIFFERENT SELF-REGULATORY MEASURES

Different self-regulatory mechanisms might be combined. Hence, a labelling system might refer explicitly, as a condition for granting a label, that the web site agrees with a code of conduct. A second point must be underlined. In certain cases, a choice might exist between different techniques of self-regulation. To illustrate this question⁶, the recent debate around the Bertelsmann report is interesting. In order to fight against harmful or illicit content, the Bertelsmann Report (1999) suggests the need to establish a comprehensive and global system of filtering elaborated and implemented by the Internet service providers which might be in that perspective be considered as the main responsible for regulating the content of Internet. This scenario differs deeply from the scenario developed by the advocates of the PICS (C.D.T. 1999). According to this second scenario, it is suggested that the Internet users will themselves use the filtering system and choose themselves the rating system of their own choice amongst multiple rating services existing and developed freely within the market.

This second scenario appears more respectful of the principle of freedom of expression than the first one which undoubtedly creates the risk of private censorship more dangerous than the public one. This simple example of different scenarii possible in order to fight against illegal content on the Internet demonstrates the need to have a public debate and assessment of the different techniques used by the self-regulation. Certain are definitively more compliant with our constitutional and democratic values than others.

6. See on that point, more extensively, M. GEVERS et Y. POULLET, “*Concernes from a European User Empowerment Perspective in Internet Content Regulation : An Analysis of some recent Statement*”, Communication et Stratégies, to be published.

CHAPTER 2 : THE ROLE OF STATE LEGISLATION IN THE (ADMISSION) RECEPTION AND PROMOTION OF « PRIVATE » SOURCES OF CYBERSPACE LAW

15. PRELIMINARY REFLECTIONS : AN ACKNOWLEDGEMENT OF THE LEGAL PLURALISM

P. Trudel (1997), paraphrasing an observation from H.H. Perritt (1992), has written that : « *the parties engaged in international transactions, for example, have developed law-creating practices. Interesting parallels can be drawn here with the regulation of electronic-commercial environments, even though we cannot currently speak of the emergence of a genuine corpus of generally applicable rules. The future of this process of normalisation will be favoured by the development of international arbitration general practices, carried through without regard to differing national legislation. Even if the customs and practices of a given field of activity are often taken into account and, to a certain degree, integrated into state legislation, the nub of such a norm still rests in its capacity to autonomously organise behaviour and transactions among the members of a community. Respect of these customs and practices is, under certain circumstances, an essential prerequisite for a participant's admission to a given community. If the importance of the community justifies it, these customs and practices can constitute a complete regulatory technique, parallel to state legislation, regulating the relationships among the members of a community and administered by their own authorities. The model of *lex mercatoria* from the middle ages is frequently cited as an example. Several current debates are involved with the opportunity of developing a similar legal framework for the regulation of cyberspace; this issue will be analysed here* ».

The doctrinal reflection on *lex mercatoria* has led a number of authors (Rigaux, 1977; Santi Romano, 1975) to see in it the opportunity for a clear and unarguable recognition of our essential legal pluralism. Developing this idea, Rigaux (1977) writes : « the citizen of a state may possess goods in, or reside in, another state, adhere to an organized religious confession, be a member of a transnational professional organization. The law of each of the states to which he is subject, the law of the church to which he is affiliated, the contractual engagements to which he subscribes in the exercise of his individual economic rights, these all present a variety of distinct legal authorities, each one but imperfectly suited to the others. »

In this perspective, self-regulatory systems and, more generally, those private sources of legislation that some choose to refer to as « soft » law, seem in fact to be legal systems in the full sense of the term.

According to van de Kerckove and Ost (1988) and other authors⁷, a structured and evolutive complex of elements interlinked between them and presenting a certain identity internally and vis à vis other legal systems. These legal systems might be in conflict, placed in juxtaposition or be considered as complementary. Certain like the international ones might be considered by the Constitution as having a hierarchical superiority vis à vis national ones⁸. But anyway, when they are recognised by another legal system, particularly the State legal system, their value is asserted as such, even though their creation may seem less legitimate than a more traditional public process of enactment.

16. THE TRIPLE CRITERIA OF A LEGAL NORM

According to authors such as Ost (1984)⁹, it is possible to characterise the validity of a legal norm following three criteria : the first one is the *legitimacy of their authors* : this quality means that the authorities in charge of the norm promulgation might be habilitated for doing that by the community of the persons which will have to respect the rule they have enacted. This legitimacy is obvious as regards the traditional State authorities insofar their power is defined by fundamental legal texts like the Constitution. It is less obvious when the self-regulation is the expression of certain obscure associations or even of certain private companies able to impose their technical standards. We will come back to the way to define a minimum set of rules concerning the legitimacy of the rule-maker. The

7. About the concept of «legal system», we invite the reader to have a look at the fundamental writing of J. Raz, *The concept of a legal system*, Clarendon Press, Oxford, 1980, 2^e ed.

8. See on that point the interesting assertion of the European Court of Justice in the famous case *Costa v. Enel* (1964 E.C.R. 585; C.M.L.R., 425 (1964) : « By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plan and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the Members states have limited the sovereign rights and have thus created a body of law which binds both the national and themselves».

9. Our triple criteria are a bit different from those envisaged by OST. This author refers mainly to the legal norms created by constitutional State authorities and in that context envisages three criteria of validity : the formal one which is the legality principle that means the fact that the creation of the norm has followed the rules of competence, of procedure imposed by the legal system and that its content is in conformity with hierarchically superior norms ; the empirical one which is the effectiveness principle which envisages to what extent on the one side, the authorities in charge of the control and respect of the rule are effectively ensuring this respect and on the other side, the citizens or addressees are conscious of the existence of the norm; finally the « axiological » one, which means that the content of the norm complies with ethical and fundamental values.

second criterion is definitely the *conformity of the content* vis à vis another or others legal rules. Again this criterion is quite easy to satisfy in case of traditional regulations where each regulations must be taken in consideration with already existing rules with superior value. It seems more intricate to satisfy when the compliance with existing legislative text is precisely not existing insofar the self-regulation is frequently a way to avoid traditional regulatory methods of rule-making. Finally, the last criterion of a legal norm is the *effectiveness of its respect*. By this criterion, one means the fact for legal norm to foresee a cost for its non respect and for the addressees of the norm to be aware of the content of the norm and sufficiently stimulated to respect it. The effectiveness is different from the efficacy of the norm, that means that the rule achieves the result pursued by its authors. The effectiveness of a legislative solution is ensured by its publication (that is the way by which the legal norm is brought to the attention of each citizen) , by the foreseeable penalties and finally by the fact that administration or the courts will ensure the control of this respect and sanction infringements. In case of self-regulation, the publicity, the control and the sanctions are to be ensured differently. We will come back (*infra*, n° 24) to that difficult point which is critical for the value of the self-regulation.

17. THE SUBSIDIARITY PRINCIPLE

Since the Maastricht Treaty¹⁰, the European principle of « subsidiarity » principle is considered as fundamental to understand both the continuity between different levels of regulatory powers and the partition of competencies between the Members States and the institutions. The principle must be summarised as follows : the European Union may only act on matters that are no more strictly within the boundaries of a Member State competence. Beyond this European meaning of this principle, we see the subsidiarity principle as hermeneutic key principle to fix the boundaries of the different regulatory techniques and bodies including the self-regulatory ones. In other words, the subsidiarity principle might be defined as follow : everything you can fix better locally or by self-regulatory solutions must be fixed locally or by self-regulatory solutions

According to this statement, the subsidiarity principle has two different meanings : the first one is the assertion that local solutions are still needed and must even be preferred to international or global solutions insofar as the

10. Maastricht Treaty on European Union, 1992, O.J. (C.224) 1 (Feb. 7, 1992). About this principle and its understanding, see notably J. CLOOS, G. REINESCH, D. VIGNES, J. WEYLAND, *Le traité de Maastricht : Genèse, Analyse, Commentaires*, Bruxelles, Bruylant, 1993, 140 and ff.

latter have to procure the general framework wherein these local solutions will take place and interoperate. From our point of view, local solutions, that means regional (from a geographical point of view) or sectorial, are the best way to take into account the cultural or business peculiarities of each situation and to develop adequate solutions. Otherwise, the regulations will be reduced to the enumeration of very vague and broad common principles.

The second meaning of the concept envisages the subsidiarity principle as a way to validate and fix the limits of the coexistence between the traditional regulatory model, the legislative one and the more « modern » one : self-regulation. In our opinion, certain concerns might be more appropriately addressed by the selfregulatory solutions than by legislative ones. The complementarity of these two approaches has been broadly asserted by many authors. Following this perspective, the question to be addressed is the criteria according to which we might judge that a solution is better solved by self-regulatory solutions. In our opinion, it is the case when it is considered that under the three criteria of the legal system validity self-regulation is deemed to be more appropriate than public regulation. To take an example, it is totally justified that consumer protection rules are set by public regulation insofar as public interests are concerned. But, at the same time, if we might also consider, as a general principle, that a free and informed consumer's consent has to be embodied in a public regulation applied differently following the sectors, according to the nature or the financial importance of the transactions. So, the setting-up of web pages , the place of the standardised contractual terms in order to meet this general requirement will be more efficiently discussed and decided within the different sectors (e.g. the travel sector's European associations might together with the consumer's associations fix precise rules on the subject which will be different than those discussed within the Banking sector for financial products)

If the subsidiarity principle does plead clearly for the diversity and legitimacy of various regulatory techniques as regards both their territorial validity and their nature, a question will be raised : how to ensure the interoperability between these various regulatory expressions ? The principle of adequate protection (*infra*, n° 27) and the traditional technique of mutual recognition might be an answer to these concerns.

18. TWO FUNDAMENTAL QUESTIONS

Hence, the questions raised by the relationships between the different legal systems are the following :

- first, is there a certain specificity in the traditional State legal system;
- second, what are the criteria the State legal system will follow to accept other legal systems ?

As regards the first question, it seems that the State legal system might be considered not as a monopoly that would be against the recognition of the legal pluralism, but as offering an ultimate recourse to analyse the validity of the other legal systems and to control the lawfulness of the solutions these other legal systems provide. Nobody might prevent any other person from suing in case of litigation before a judicial court.

As regards the second question, three considerations must be addressed :

The first one (A) analyses how the traditional State legal system will receive the other legal systems through the application of four fundamental principles. The second consideration (B) scrutinises the recent official European documents in order to see how they deal with the problem of self-regulation validity and the respect of the three criteria developed above : legitimacy, conformity and effectiveness. The third consideration (C) is the analysis of two provisions of the Data Protection Directive taking into account, directly or indirectly, the problem of self-regulation.

A. The acceptance of private sources by State law

19. THREE PRINCIPLES ARE TO BE TAKEN INTO ACCOUNT : CONTRACT, FAIR TRADE AND RESPONSIBILITY

The general and universal principles of State law, particularly those of contractual autonomy, fair and equitable trade and responsibility can be taken initially as a control model for private sources of « Cyberlaw ».

In that context, one has to underline the different targets pursued by the authors of a code of conduct. The sole target of self-regulation was to fix the rules of behaviour between the actors, represented in the process of the code of conduct drafting and negotiating. The main aim is then to avoid unfair and wild competition between them. Sometimes, the code of conduct will pursue another goal and provide solution with external effects. Thus, when self-regulation defines the acceptable professional behaviour vis à vis third parties concerned by the operations regulated by the code of conduct, it is clear that it intends to have effects vis à vis third parties including especially,

but not only, parties contracting with the actors submitted to the code of conduct. For example, if a Direct Marketing Association forbids or on the contrary accepts certain advertising methods or messages, this attitude might affect third parties regardless of the fact that they will become contractual parties. This external effect of the code of conduct is from the legal point of view more questionable than the internal effects.

As regards the external opposability of the code of conduct to persons who are not only third parties but could become contracting parties and in that quality, could be considered as submitted to the content of the code of conduct. It would without doubt be sufficient for a judge to go « to the limits of contractual logic » , as M. Vivant (1997) assures us, to become aware of the absence of fully free and informed consent from the netizen in accepting a 'policy' or a code of conduct that barely respects his interests. This approach will put into question not only the content of the private norm, its conformity with the legal rules, its clarity, and its possible unfair character but also, the integration of the code of conduct within the scope of the contract, which might be questionable when the code of conduct is referred to only on a web site through a hyperlink difficult to activate¹¹.

As regards the other « third parties » which might be considered as harmed by a behaviour, although in strict conformity with the content of the code, the recourse to standards such as « good faith », « *pater familias* » ; « as well as possible » often permit lip service to the adoption of an ethical code, that could represent a professional standard whose infringement automatically constitutes a fault (F. Osman, 1995). On the contrary, recourse to standards authorises the denunciation of self-regulation or systems of certification whose content does not seem to comply with such standards.

The adoption by certain actors within a sector of « codes of conduct » or of « technical norms » may be intended to harm competition in some way. It will be sufficient to invoke the principles of free and fair trade to strip them of all value.

20. REJECTION OF PRIVATE JUDICIAL SYSTEMS WHERE PUBLIC ORDER HAS BEEN CONTRAVENED

The body of case law dealing with the activities of professional association, either at the time of the enactment of disciplinary rules either

11. As regards this point see article 10 of the Draft proposal of Directive on certain legal aspects of the electronic commerce, which imposes on the information service provider to provide to the customer a direct access notably by hyperlink and the ability to store and reproduce the codes of conduct to which the I.S.P. refers.

during their application, allows us to extrapolate certain rules which are relevant when tackling the subject of self-regulation in cyberspace. This equally applies to legal systems whose right to create norms is undisputed. Case law has sometimes, called them into question, particularly in the following situations (N. Decoopman, 1989).

- When the norm is in conflict with a State norm judged to be of public interest. For example, a code of conduct authorising a server to process data obtained by means of cookies, without prior information of the netizen concerned would constitute an infringement of the principle of transparency upheld by the Data Protection Directive. Furthermore, the space available for self-regulation is reduced each time a conflict involves a superior motive or fundamental value. State law will either by decree or by recognition proclaim such norms as of public interest. This assertion should, however, be moderated by the following consideration : the efficacy of the state norm can be reduced insofar as State authority does not possess the means to enforce it. In such a hypothesis, the State recognised norm is granted a value more symbolic than real, and self-regulation may represent the lesser evil ;
- When the application of the norm represents an abuse of rights inasmuch as the sanction is disproportionate to the infraction concerned, or its levying has not taken into account the minimum right of the defence foreseen by Article 6 of the European Human Rights Convention. This question is delicate so far self-regulation does claim to external effects particularly when privacy or consumer protection questions are addressed by the code of conduct or by technical norms. One would like to underline the very interesting solution set down in by the Article 17 of the Directive on certain legal aspects of the electronic commerce (200/3, 8 June 2000) : « Member States shall ensure that bodies responsible for out of court settlements of consumers apply the principles of independence and transparency, the adversarial principle, and the principles of effectiveness of the procedure, legality of the decisions, liberty of parties and representation ».

In an Internet context there are certainly sanctions which, through their unilateral application by less than transparent authorities without any external control, may be deemed abusive of a party's rights. Thus the immediate revoking of a server's certificate for alleged behavioural non-

conformity to a code of conduct may appear as unacceptable censorship to a state authority concerned with the respect of freedom of expression and the principle of unrestricted defence.

B. The application of the three criteria of validity of the legal norms vis à vis self-regulation in recent official European Documents

21. THE MULTIPLIED REFERENCES TO SELF-REGULATION IN RECENT OFFICIAL EUROPEAN DOCUMENTS CONCERNING THE INFORMATION SOCIETY

It is difficult to enumerate all the references to self-regulation made by the official documents on the Information Society but the following examples are quite significant in order to illustrate the approach chosen by the European Union as regards the value of this self-regulation.

The European Commission Green Paper on Commercial communications in the internal market of May 8, 1996¹² considers self-regulation as an integral part of the regulatory framework applicable to commercial communications. Therefore, the Commission recommends that these self-regulatory instruments should be assessed as regards their proportionality vis à vis their purposes. Furthermore, the Commission recommends that these instruments be publicly available and that the complaints procedure should be accessible from abroad.

The European Council Recommendation dated 24th of September 1998¹³ « about the development of the competition within the audiovisual and information services by promoting the protection of minors and human dignity » goes further. A number of indicative guidelines are annexed to the recommendation. These guidelines are aimed at ensuring a full participation of all interested parties (public authorities, consumers, users and industries) in the drafting, implementation, evaluation and control of the respect of the codes of conduct. This participation is judged necessary in order to legitimate the recourse to self-regulatory solutions.

The Directive on certain legal aspects of the electronic commerce establishes in the same way that the consumer associations shall be involved in the drafting, implementation and evaluation of these codes. Moreover, the actors must ensure their complete transparency and accessibility.

12. COM (96) 192.

13. Published in the O.J.98/560/CE.

Finally, the European Community in its reply to the WIPO request of comments about Internet Governance- Management of Internet Domain Names and Addresses has broadly defended the self-regulatory approach proposed by the WIPO based on the adoption by each registration authority of a certain number of « best practices ».

22. THE CRITERION OF LEGITIMACY OF THE AUTHORS FOLLOWING THESE DOCUMENTS

As mentioned above, the Directive on e-commerce, like the one on the protection against illicit and harmful content requires very clearly that all interested parties in the application of self-regulation be involved in the drafting, implementation and evaluation of the codes of conducts¹⁴. It means that in case of unilateral drafting, the validity of these self-regulatory instruments might be questioned before the Courts.

The list of the categories of interested parties might differ according to the content of the code of conduct. It is quite clear that the prior consultation of the sole consumer associations will not be considered as sufficient if certain provisions of the code of conduct address specifically the problem of privacy or of illegal content of the messages. In that context, different cultural or philosophical associations must be consulted.

The criterion of legitimacy in case of a self-regulation might be more easily fulfilled in certain countries than others. It is obvious that the bargaining power of consumers associations those associations defending cultural values or fundamental liberties is more important in the U.S. than in the E.U. This statement might explain the better acceptance of the self-regulation mechanisms in the U.S. than in the E.U. It might be feared that in Europe, the legitimacy of a code of conduct concluded by the sole private parties will be deemed as not sufficiently legitimated without the arbitration of the public bodies intervening in order to ensure an adequate balance between the different interests. The Dutch Code of Conduct on electronic Commerce concluded under the auspices of the Dutch government is a good example of this.

14. Compare : « To be effective, codes of conduct must be the product of and be enforced by self-regulatory agencies. Such agencies must be broadly representative and accessible to all relevant parties.... Effective self-regulation requires active consumer and citizen consultation by such agencies. Without user involvement, a self regulatory mechanism will not accurately reflect user needs, will not be effective in delivering standards it promotes, and will fail to create confidence» (Self-regulation of Internet Content, Memorandum of the Bertelsmann Foundation, available at <http://www.Bertelsmann-stiftung.de>).

23. THE CRITERION OF CONFORMITY FOLLOWING THESE DOCUMENTS

Two remarks might be addressed. The first one is that most of the documents require that the self-regulation in full respect of the legislation applicable ensures a specific (sectored or tailored to the technical specificity of the operation) application of the principles enacted by that legislation. So self-regulation is viewed as a complementary legal system. The fact that the principles embodied into the legislation are often very vague offers to the authors large possibilities of choice in order to reach the legislative requirements. The second point is the assertion that the European Commission must be informed systematically about the content of the codes of conduct in order to assess not only the compliance of the code of conduct vis à vis the legislation but their overall proportionality as regards these legislative requirements¹⁵. That means that self-regulatory mechanisms may not be used as a way to introduce barriers to the free movement of goods or free trade of services.

24. THE EFFECTIVENESS OF THE SELF-REGULATORY INSTRUMENTS UNDER THE EUROPEAN OFFICIAL DOCUMENTS

- Most European documents insist on the necessity to publish and make accessible as far as possible the content and interpretation of the code of conduct to the Internet users in order to create a full awareness of it. A second point has to be made. The major argument of self-regulation is the fact that it offers more effective mechanisms than the legislative means. This argument is taken seriously into consideration by the European Union which requires under the communication on illegal and harmful content that certain self-regulation mechanisms be set up such as complaints procedures, hot lines, immediate blocking systems, etc. Furthermore, European institutions underline the necessity for the sanctions provided both by self-regulatory mechanisms and by legislative provisions to be « effective, dissuasive and proportionate » in order to avoid abuses. We have already underlined (see, *supra* n°20) that the Alternative Dispute Resolution (A.D.R.) Mechanisms to be created in the context of codes of conduct, must obey to the fundamental principles of due process and that they must be accessible to any complaining party.

15. See thereabout the directive on e-commerce and the Green paper on commercial communications quoted above.

C. The promotion of the private legal systems : considerations on certain provisions of the 95/46 data protection directive

25. TWO TYPES OF PROMOTION

Taking as starting point two provisions of the Directive referred to, we would like to show :

- 1) how State law articulates both public and private norms and thereby promotes the adoption of the latter (with reference to Article 27) ;
- 2) how a national legal authority, while respecting the culture and system of other legal authorities, can establish certain criteria for the recognition of private norms conceived in those other juridic authorities (with reference to Article 25).

26. MONITORED CODES OF CONDUCT

Article 27 §1 of the Directive provides that « *The Member States and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors* ». The editors of such codes could submit them to monitoring authorities who would verify their conformity with existing regulations.

The text also envisages the drawing up of community codes which could be submitted to a European data protection group that would examine their compliance with the national provisions.

Once the codes have been submitted for their inspection, both the national monitoring authority and the European group could, « should they deem it appropriate », gather the opinions of the persons concerned or their representatives. Finally, depending on whether the code was national or European, each of these authorities respectively could take steps to ensure publication (Boulangier et *alii*, 1997).

The Directive's aim is simple : both self-regulation and certification represent effective tools for the directive's enactment. They contribute to the improvement of the brand image of those who submit to these self-regulatory instruments and increase the confidence of the netizen. Their flexibility and specificity make them suitable for evolutive solutions adapted to the particularities

of each sector. Finally, their European character serves to guarantee equivalence of protection with regard to electronic processes operating in any corner of the continent.

Recognition by State authorities of these codes of conduct takes two forms.

- the formal procedure of confirmation does not only apply to the basic criteria which constitute respect to the provisions of the directive, but also to more procedural criteria : the publishing of the content of self-regulation or criteria for certification, the transparency and openness of debates, taking into account the range of parties interested in these processes, in particular those directly concerned;
- in any event, the codes of good conduct cannot exempt the Data controller from applicable areas of national legislation derived from the directive which guarantee the respect of subjective rights and the possibility for the persons concerned to go to law. Such submission to the law brings to codes, a certain legal weight, given the fact that the law, accompanied by the restraining force of justice, remains the ultimate guarantee of the effectiveness of the principles enunciated therein.

27. « ADEQUATE » PROTECTION, OR HOW A STATE AUTHORITY CAN IMPOSE ITS VALUES IN A FLEXIBLE MANNER ON A THIRD COUNTRY IN THE GLOBAL INFORMATION SOCIETY (Y. POULLET, B. HAVELANGE)

Article 25.1 of the Directive provides that « *The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection* ». The principle is therefore to prohibit transmission unless an adequate level of protection can be proven by the third country.

The Directive, rendering this yet more precise in Article 25.2, goes on to say that an evaluation of the adequate nature of data protection in a third country must take into account « all circumstances relating to a transfer or type of transfer » and in particular the different factors, of which some are inherent to the type of transfer being considered, such as the nature of the data itself, the finality and the duration of the process, the country of origin

and the country of destination, and others concerning the level of protection in the third country such as « current legal provisions both general and sectorial, as well as professional rules and the security measures which are respected there ».

In particular, the text of Article 25 presumes a functional approach, that is to say, that the protection should be evaluated according to the risk of the breach, risk arising from the type of flow, as according to the specific or general measures undertaken by the party responsible for the data in the third country to reduce such risks.

The evaluation of these measures should be made without any bias. There is no question here of imposing European mechanisms to third countries but rather to appreciate to what level the goals of protection pursued by the Directive are encountered there, whether in an original way or not. In this sense, the idea of adequate protection does not in any sense represent a weakening of the data protection envisaged by the Directive. In fact, the idea of adequate protection induces a confrontation between the protective demands of the directive and the responses given by the third country. The aim is to see whether there is a « functional similarity ». The « functional similarity » implies that we are concerned to find, not a pure and simple transposition of European principles and systems of protection in the third country, but rather the presence of those elements fulfilling the required functions, even if the said elements are of a different character to those we are familiar with in Europe. This certainly encourages a better respect of the local structures and legal characteristics than would the requirement of equivalent protection, which calls for complete legislative similarity.

In particular, with regard to the protective instruments created in the third country, Article 25 does not only refer to norms established by public authority, whether general or sectorial in character, but equally to codes of conduct or technical measures, provided these are « respected ». Thus the person entrusted with evaluating foreign protection would be more attentive to the « effectiveness » of an instrument than to its nature : what matters is that the knowledge of the instrument in question, even if it is just a simple company privacy policy, be widespread among the persons concerned and among those responsible for files. Similarly the trustee would be mindful of the option of claims or appeal by individuals calling those responsible to account in the event of any non-respect of these instruments. Finally, he would meticulously evaluate the quality of the authority in charge of claims

and appeals, its accessibility and its functional transparency (Working Paper of the Art. 29 Working Group, 1998).

28. REGARDING THE CONDITIONS OF SELF-REGULATION

What conclusions can we draw from these two provisions of the Data Protection directive as lessons both as to the value of private norms and to the synergy between these and the norms established by the State ?

First, the private norm is the best accepted, being defined within the framework of principles or standards established by the State norm. Such standards not only enable an evaluation of the private norm's conformity of content to society's expectations, but also assures its greater effectiveness.

Second, the private norm may be deemed « adequate » with regard to the State norm if the procedure under which it was drawn up conforms to certain demands of legitimacy : firstly, has that procedure permitted the expression of the opinions of, and taken into consideration the interests of, the different parties concerned by the operations to be regulated; and secondly, is the norm in question transparent. Is it genuinely effective, i.e. can binding sanctions be handed down by an authority equipped with powers of investigation, acting independently, easily accessible to all and whose dealings are transparent (for example, via a public report of its activities, or the publishing of its decisions) ?

CONCLUSIONS

29. THE STATE NORM : A NECESSARY INTERVENTION

We must ask, with regard to state sources : what is the use of a national legislation when, as we have shown, the international character of the network, and the impossibility of mastering the space-time co-ordinates of exchanges lead us to admit the impotence of nation states in the effective application of the norms they have drawn up ? The emotion caused in 1996 by the intervention of a German court, charging access servers with having allowed the access to pornographic material, shows however, that even if state law does not have completely effective instruments at its disposal, it is nonetheless capable of motivating private parties to put self-regulatory solutions in place that are at least partially (if not totally) satisfactory. The State, therefore, cannot simply resign, but rather, without pretending to

police the network in a thorough manner, it should duly call attention to the social values that enshrine the norms, even if this is only in order to provoke appropriate self-regulatory reflexes and to serve as their basis. It is noticeable that even in the U.S, country which is deemed to be the leader in the defence of the self-regulatory solutions, the public bodies are playing an increasing role in the promotion of these solutions. In August 98, Mr Pitofsky, chairman of the Federal Trade Commission, asserted : « *Unless Industry can demonstrate that it is developed and implemented broad-based and effective self-regulatory programs by the end of this year, additional government authority would be appropriate and necessary* ».

Since this assertion before the Congress, the American Government has taken different initiatives like the « Global Alliance » in order to protect privacy efficiently, in the context of its discussion with the European Union according to the request of Article 25 of the Data Protection Directive.

Furthermore, the search within supra-national bodies, such as Unesco, for common principles and solutions in areas such as the protection of minors, of consumers, of the signature etc., encourages the normalising of working channels, indeed co-operation (even if only among police forces) between states. In the absence of such a consensus, the position taken by a supra-national organisation such as the European Union can serve as a starting point for international negotiation with other countries also entrusted with the search, doubtless *via* means more in keeping with their own legal traditions, for adequate protection vis a vis the principles enunciated by the European Union.

Facing the social revolution that the Internet represents, particularly the dislocation of space-time frontiers, state law, the expression of the social regulation of behaviour, is — and has a right to remain — present. The law cannot allow itself to be content with deploring the limitations placed on its own enforcement and affirming the essential lawlessness of cyberspace. On the contrary, it must find, in the context of a pluralist normative expression, an adequate active role. As far as possible it will refer, by application, adaptation or reform of general principles, to the normative mechanisms present in the network : the application of principles via self-regulation, technical standardisation. Depending on the case, it will draw its inspiration for the definition of rules, if possible at the international level, from the content of internal network regulation. What we are seeing here, to use M. Vivant's expression (Vivant, 1997), is without doubt the emergence of « post modern law », or what J. Reidenberg (1996) refers to as a new « network governance paradigm ».

Far from sanctioning the State's resignation, this « post modern law », this new « paradigm » calls for the creation of new forms of dialogue between diverse ethical and regulatory normative techniques and between the democratic authorities capable of fostering such a dialogue and placing it at the service of the public interest.

On the one hand, the State cannot abandon Internet regulation to the sole initiative of its users. We have seen that, in the absence of specific regulation, a reaffirmation of major legal principles spurs the parties to take measures including self-regulatory instruments and leads to the development of appropriate techniques. The Decency Act case is significant from that point of view. The fact that a legislative intervention has taken place has led the Internet industry players to propose rapidly another solution : the P.I.C.S. in order to fight against illegal and harmful Internet content. It is not sure that without the legislative pressure, these kind of technological solutions would have been found quasi instantaneously.

On the other hand, we should like to stress the State's vital obligation to intervene at a time when, in our opinion, deserting the Internet and withdrawing from the field of regulation to such a point that it no longer even decides the general framework, would notably put at risk public order, fundamental liberties and other basic values.

Finally, through possibly watchdogs like Privacy Commission, the State has the imperative duty to check if the fundamental principles : contract, free competition, rules of the art and public order are respected in the drafting up and the concrete implementation of self-regulation. It is also the State's responsibility to analyse whether the validity conditions of self-regulations as legal norms are fulfilled. Therefore, it must be ensured that all interested parties have a real right to participate in the formulation, evaluation and application process as regards the code of conduct, that the content of these codes is not prejudicial to legal right and finally that the code of conduct enforcement will be effective, transparent and proportionate. This action is necessary. It is not obvious that suddenly the market driven forces will follow these rules fundamental for the survival of our democratic society and the individual liberties. From a personal point of view, to take the example of the control of Internet illicit and illegal messages, we are more afraid of the private censorship than the public one.

The precise division of labour between the state or supra-national body and the Internet users remains to be defined. It will doubtless be a dynamic relationship, that could enable users to demonstrate a certain creativity in the enactment of the framework proposed by State legislation.

30. THE VALUE AND LIMITATIONS OF SELF-REGULATION

This being said, there can be no question of rejecting self-regulation as a normative source in the fullest sense of the term. As F. Osman (1995) concluded, whether we choose to see it uniquely as a question of time and context or the proof that the law must « progressively suffer both the attraction and the yoke of the economic facts which dominate it and to which it has become a tributary », such a phenomenon can only serve to awaken the interest of lawyers who have been taught that the sanction is part of the mechanism of the rule of law. It naturally arises that they are tempted to search everywhere, even in « soft law ». And if the criteria of the sanction as a characteristic of the rule of law is a false criteria, despite doctrinal attempts to revive it, this is doubtless because the effectiveness of rules of social conduct, whether they « rule or regulate », does not necessarily reside in the adherence to them by the social body for which they are destined.

This consideration, which addresses the normative sources of « *lex mercatoria* » ought to be equally applicable to « *lex electronica* », but it cannot have the same range and, without a doubt, this justifies a more resolute intervention from the State law. Firstly, the netizen environment, except in the newsgroup context, or in certain situations such as universities or trade between merchants, does not have anything like the homogeneity of the professionals. Secondly, where « *lex mercatoria* » only regulates economic questions, « *lex electronica* » is concerned with culture, values and liberties.

It would appear from this, therefore, that self-regulation should be controlled. Though it is certainly capable of representing the spontaneous expression of a particular community, this is rarely the case. Furthermore, State law is obliged at least to fix the standards which serve as a basis for the development of self-regulation and its associated normative techniques and to see to it that the mechanisms for the setting up of these regulatory techniques and the application of the content of these private norms is transparent and takes into account the interests of the various parties concerned. The dialogue must involve all interested parties in a transparent discussion. That is the duty of the State(s) to impose the effective participation of certain parties less powerful, that represent what we might call : the « public voice ».

31. CO-REGULATION OR INTEGRATED EFFECTIVE MIX :

The recent O.E.C.D forum on electronic commerce has extensively discussed the nature of the relationships between public regulation and self-

regulation. In our opinion the fundamental recognition of the legal pluralism does not mean that we are in favour of a co-regulation, which implies implicitly that the two types of legal systems are placed on the same footing and that a fixed partition between the competencies of the first and the second ones are more or less fixed. We prefer to speak about a cooperation and dialogue between private and public regulations in order to find the best way to ensure effectively the achievement of public interest objectives, in the full respect of the balances embedded in our legislation and international Conventions. Perhaps, that is what we might consider as the « integrated effective mix between public and private regulations ».

This approach requires a dialogue between multiple bodies, public and private regulators located at local, sectoral, national, regional and international level in order to find progressively not common but interoperable solutions following the « adequacy » methodology. We are not of opinion that to a global cyberspace corresponds a global regulation or self-regulation. This fantasy of a global regulatory system does not pay attention to the fact that the netizens are citizens located in a particular space with its own culture, way of life and regulatory approach. In other words, it is necessary to think globally but to act or rule locally.

BIBLIOGRAPHY

Introductory note : This bibliography is not exhaustive. It refers only to the materials used by the author.

BALDWIN I. and CAVE M., *Understanding Regulation*, Oxford Univ. Press, 1999.

BERLEUR, J. and BRUNNSTEIN, K.(eds.), *Ethics of Computing : Codes, Spaces for discussion and law*, London, Chapman and Hall, 1996.

BERTELSMANN-FOUNDATION, Self-regulation of Internet Content, Sept. 99, available at the Bertelsmann Foundation's site : <http://www.bertelsmann-stiftung.de/foundation>.

BOULANGER, M-H. et *alii*, « La protection des données à caractère personnel en droit communautaire », *J.T.D.E.*, 1997, pp. 121-127, pp. 145-155 et pp. 173-179.

BROUIR, J.N., « La société de l'information : nouveau marché au projet de société », in *Libertés, droits et réseaux dans la société de l'information*, Bruxelles, Paris, Bruylant, L.G.D.J., 1996, pp. 285-296.

Center for Democracy Technology, An Analysis of the Bertelsmann Foundation Memorandum on self-Regulation of Internet Content/ Concerns from a User Empowerment Perspective, Oct. 1999.

CERF, V., *Guidelines for conduct on and use of Internet*, 14 august 94, available at : <http://www.isoc.org/policy/conduct/cerf-Aug-draft.html>.

DECOOPMAN, N., « Droit et déontologie : contribution à l'étude des modes de régulation », in *Les usages sociaux du droit, Travaux du CURAPP*, Paris, PUF, 1989, pp. 87-105.

DELACOURT, J., « The International Impact of Internet regulation », *Harvard Law Journ.*, 38, 207 and ff.

DINANT, J-M., « Using PICS as an Enhancing Privacy Technology », 20 p., available at : <http://www.droit.fundp.ac.be/crid/eclip/pics.html>.

DINANT, J-M., « Les traitements invisibles sur Internet », in *Droit des technologies de l'information : regards prospectifs*, Cahiers du Crid n° 16, Bruxelles, Bruylant, 1999, pp. 271-294.

- DUNNE, R., « Detering unauthorised access to computer : controlling behavior in cyberspace through a contract law paradigm », *Jurimetrics Journal*, n° 35, 1994, 11ff.
- DUSOLLIER, S., « Electrifying : the legal protection of technological measures for protecting copyright », *EIPR*, n° 6, 1999, pp. 285-297.
- FRYDMAN, B., « Quel droit pour Internet » in *Internet sous le regard du droit*, Ed. du Jeune Barreau de Bruxelles, 1997, pp. 279-316.
- GELLMANN, B., « Can Privacy be regulated effectively on a national level ? Thoughts on the possible need for international Privacy Rules », *Villanova Law Review*, 41, 1, 1996.
- GILISSEN, J., *Le pluralisme juridique*, Institut de Sociologie, Bruxelles, Ed. U.L.B., 1972.
- GOBERT, D., SALAÜN, A., « La labellisation des sites Web : classification, stratégies et recommandations », *DA/OR*, 1999, n° 51, pp. 83-94.
- HACKER, P.M.S. and RAZ, J. (eds.), *Law, Morality and Society, Essays in honour of H.L.A. Hart*, Oxford, Clarendon Press, 1977.
- HARDY, T.I., « The Proper Legal Regime for 'Cyberspace' », 55 U. of Pitt. L.R., 1994, 993-1055.
- HAVELANGE, B., POULLET, Y., *Preparation of methodology for evaluating the adequacy of the level protection of individuals with regard to the processing of personal Data*, Annex to the Annual Report 98 (XVD/5047/98) of the W.P. established by Art. 29 of Directive 95/46/CE.
- Internet Law and Policy Forum*, Bibliography on Self-regulation on the Internet, 1998, available on <http://www.ilpf.org/selfreg/selfreg2.htm>.
- JOHNSTON, D. et POST, D., *Laws and Borders – The Rise of Law in Cyberspace*, 1996.
- KATSCH, M.E., « Dispute Resolution in cyberspace », *Connecticut Law Review*, 28, 1998, 953 and ff.
- LAVENUE, JJ., « Cyberspace et droit international : pour un nouveau ius communicationis », *Revue de la Recherche Juridique – droit prospectif*, 1996, pp. 811-844 (quoted : LAVENUE, 1996).
- LAMOULINE, Ch., POULLET, Y., *Des autoroutes de l'information à la démocratie électronique*, Rapport présenté au Conseil de l'Europe, Bruylant, Némésis, Bruxelles, 1997.

- LOUVEAUX, S., POULLET, Y., SALAÜN, A., « Une protection in cyberspace, some recommandations », *INFO*, n° 1/6, 1999, pp. 521-537.
- MARTENS, P., « La vie privée est-elle soluble dans l'éther ? Technologies nouvelles et droits de l'homme » in *Libertés, droit et réseaux dans la société de l'information*, Bruxelles-Paris, Bruylant-L.G.D.J., 1996, pp. 181-211.
- MONTERO, E., *La responsabilité du fait des informations accessibles en ligne*, Thèse, Travaux de la Faculté de droit, Namur, PUN, 1998.
- O.E.C.D., Working Party on the Information Economy : The Economics of self-regulation on the Internet, DSTI/ICCP/IE, (98), 7.
- OGUS, A., « Rethinking Self-regulation », *Oxford Journal of Legal Studies*, 1995, 15, 97 and ff 5.
- OST, F. « Considérations sur la validité des normes et systèmes juridiques », *J.T.*, 1984, 1 and ff.
- OSMAN, F., « Avis, directives, codes de bonne conduite, recommandations, déontologie, éthique, etc : réflexions sur la dégradation des sources privées du droit », *RTD civil*, 1995, pp. 509-531.
- PERRITT, Jr, H., « Dispute Resolution in Electronic Networks Communities », *Villanova Law Review*, 1993, 349-401.
- PERRITT, Jr, H., « Jurisdiction in Cyberspace : The Role of intermediarie » dans *Symposium on Information, National Policies and International Infrastructure*, Harvard, 28-30 janvier 1996,
- PERRITT, Jr, H., « The Electronic Agency and the Traditional Paradigms of Administrative Law », *Administrative Law Review*, 1992, 44, 79-105.
- PRICE, M.E., VERHULST, S.G., *The concept of Self-regulation and the Internet, Report made for the Bertelsmann Foundation*, Sept. 99, available at <http://www.bertelsmann-stiftung.de/foundation>.
- POULLET, Y., « Le droit de l'informatique existe-t-il ? », in *Droit de l'informatique : enjeux-nouvelles responsabilités*, Conférence du Jeune Barreau de Bruxelles, 1993, 1-43.
- POULLET, Y., QUECK, R., « Le droit face à Internet, Internet face au droit », *cahier du CRID* n° 12, 1997, pp. 231-249.
- POULLET, Y., ROYEN, J., « Rapport de l'atelier : Commerce électronique : vers la confiance », *Agora consommateurs*, 1998, 73 p.
- POST, D., *Anarchy, State and the Internet : An essay on Law-Making in Cyberspace*, 1995, J. Online L art 3, <http://www.law.cornell.edu/>

- REIDENBERG, J., « Governing Networks and Cyberspace Rule-Making », *Emory Law Journal*, 911, 1996.
- REIDENBERG, J., « Governing Networks and Cyberspace Rule-Making », *Symposium on Information, National Policies and International Infrastructure*, Harvard, 28-30 janvier 1996, available on : <http://ksgwww.harvard.edu/>
- REIDENBERG, J., « Lex Informatica : The formulation of Information Policy Rules through Technology », 76, *Texas Law Review*, 3, 1998, pp. 553 et s.
- RIGAUX, F., *Droit public et droit privé dans les relations internationales*, Paris, Dalloz, 1977.
- RIGAUX, F., « Le droit au singulier et au pluriel », *R.I.E.J.*, 1982, n° 9, p. 45 et s.
- RINALDI, A., *The Net : User Guidelines and Netiquette*, 1995, available at : <http://www.face.edu/rinaldi/net/index.html>.
- RODOTA S., « Démocratie électronique », *Rapport général , Conseil de l'Europe*, Séminaire sur la demande électronique, 23-24 mars 1995, Sénat, Palais du Luxembourg, Paris.
- SANTI ROMANO, *L'ordre juridique*, Paris, Dalloz, 1975.
- SAMUELSON, P., *Technological protection for copyrighted Works*, 1996, available at <http://www.sims.berkeley.edu/~pam/>.
- TRUDEL, P., « Le cyberspace : réseaux constituants et réseau de réseaux », Jacques FRÉMONT et Jean-Paul DUCASSE (éd.), *Les autoroutes de l'information : enjeux et défis*, Actes du Colloque tenu dans le cadre des Huitièmes entretiens Centre Jacques Cartier, Rhône-Alpes, 5 au 8 décembre 1995, Montréal, Les chemins de la recherche, 1996, 137-159.
- TRUDEL, P. et alii, *Droit du cyberspace*, Université de Montréal, Ed. Thémis, 1997.
- TRUDEL, P., « Les effets juridiques de l'autoréglementation », *R.D.U.S.*, 1988-89, pp. 247-286.
- van OMMESLAGHE P., *L'autorégulation : Rapport de synthèse*, Colloquium Brussel, 16th of december 1992, Coll. De la Faculté de droit U.L.B. Bruylant, 1995, 232 and ff.
- VAN DE KERCHOVE, M., Ost , F., *Le système juridique entre ordre et désordre*, Paris, P.U.F., 1988.
- VIVANT M., « Cybermonde : droit et droits des réseaux », *Semaine Juridique*, 1996, I, n° 3969.

WILKINSON, A., *An Agenda for Industry self-regulation*, Speech presented at Mundo Internet 98, Madrid 19 Febr. 1998.

WITTES, B., « Law in cyberspace. Witnessing the Birth of a Legal System on the Net », *17 & Legal Times*, 23 February 1995, 27.