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### Is there an european internet law ?

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*Yves Poulet*  
A European Internet Law?

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The participation to a Liber Amicorum involves a delicate operation which is the choice of the subject. The subject must not only enable the writer to express on one of his favourite topic; it must moreover enable the amicus to whom the book is offered to rediscover the emotional memory of their discussions and to invite him to “new” discussions. Dear Wolfgang, you have accompanied my first steps in all the topics of the Computer Law from computer contracts to privacy issues and I have always been fascinated by your European approach of this field. The title of my friendly input within this Liber Amicorum does therefore envisage the specificity of the European regulatory approach of the Internet Law. My discourse has to be modest: the following thoughts are the result of my own reading of a disparate heap of legislation and official rulings by the European authorities. None of those authorities has indicated the “guiding thread” of their understanding.<sup>1</sup> Accordingly, these thoughts are intended merely to provoke debate and probably, to be more precise, to help define a clearly stated European policy.

My first consideration concerns the extent of European intervention. It is not sufficient to state its main features, one must then describe its specific nature and originality in the various areas of that intervention (Section I). Although European legislative measures are increasing, made obligatory by the single market, more impressive still is the concern of the European authorities to establish mechanisms that in addition to common legislation, encourage complete harmonisation of the interpretation and implementation of those measures. In short, the establishment of a common, comprehensive legal system for the “information society” services. Does that intent of the information society not harm the principle of “subsidiarity” which is nevertheless a pillar in the construction of Europe? (Section II). Other topics would have to be developed:<sup>2</sup> so it seems that the European authorities have developed through various documents and decisions a specific approach of the self-regulation which is more to be defined as a co-regulation. Beyond that, through recent cases like the Echelon or Yahoo.<sup>3</sup>

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<sup>1</sup> Note, however, some key documents, such as the Communication from the European Commission of 8 December 1999 on an initiative called “e-Europe- An information society for all”, repeated to a large extent in the conclusions of the Stockholm European Council on 22 and 23 March 2001.

<sup>2</sup> These other topics have been developed in my article: “Vers la confiance: Vues de Bruxelles – Un droit européen de l’Internet”, *Lamy, Droit de l’informatique*, 2001, Suppl., Nov. N° 141, p. 11 and ff.; Dec.N° 142, p.1 et seq. The present contribution is a broadly revised and updated version of this article.

<sup>3</sup> Trib. Gde instance Paris Nov. 20, 2000. On that decision read the debate organized by *L. Thoumyre* on his web site JURISCOM ( <http://www.juriscom.net/uni/doc/yahoo.htm> ) in February and January 2001 in which *Trudel*, *Reidenberg*, *Geis.*, and *myself* have participated. See also, *Reidenberg*, L’affaire Yahoo! Et la démocratisation internationale d’Internet, *Classeur*, Communication - Commerce électronique, 2001, p. 14 et seq. See the reports established by *Schmid, G.*, (rapporteur) on the existence of a global surveillance system to intercept private and commercial communications, Report addressed to the temporary Committee of the E.U. Parliament, P.E. 305.39I, May the 18<sup>th</sup>.

## I. Some features of European regulatory involvement

European regulatory involvement can be found in the three key areas of development of information society services, that is to say the regulation of e-commerce operators and transactions, the protection of individual freedoms likely to be called into question by that development and finally, the protection of any existing intellectual property and related rights concerning the content of those services. It is useful to give an overall description of that regulatory involvement both from a quantitative and qualitative point of view.

### 1. General comments

In that respect, firstly it will be noted that no subject escapes European jurisdiction. Subjects such as electronic signatures, the protection of intellectual investments or the security of electronic methods of payment apparently fall within the jurisdiction of Europe, with the aim of constructing a single European market. European intervention in the protection of freedoms, now widely justified by adoption of the European Charter of individual freedoms,<sup>4</sup> would previously only have had indirect justification in that by retaining different legal systems there was a danger of creating barriers to intra-European traffic or it would lead to distortion of the regulations, thereby favouring the establishment of an information society service in one country rather than another.

That indirect justification by the free movement of services or by freedom of establishment led to European intervention, including in matters of computer crime and the protection of minors and human dignity,<sup>5</sup> beyond the strict powers conceded by the “3<sup>rd</sup> pillar” of the Treaty of Amsterdam.<sup>6</sup> In these matters, I would emphasise that without European intervention there would be a danger that different national measures would be adopted leading to distortions of competition between countries. Consequently, the obligations to set up “hot lines” or systems for filtering or storing data to be used by the services could be introduced by some countries and not others. That finding explains why European regulations are increasing: in the specific fields of multimedia and e-commerce alone, a consultancy company<sup>7</sup> found no less than 48 initiatives (directives, recommendations and communications) that had been completed or were in the process of being completed, from the famous directive on certain legal aspects of e-commerce to the directive on harmonisation of the rules relating to invoicing for the purposes of VAT including the Communication and outline decision of 28

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<sup>4</sup> About this Charter of fundamental rights of the European Union, approved at the Nice European Council in December 2000, read the Reports of the Strasbourg Study Days of 16 and 17 June 2000 published in the *Universal Review of Human rights*, 12, 15/9/2000.

<sup>5</sup> Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, O.J., L.270/48, 7/10/1998.

<sup>6</sup> The provisions of the Treaty of Amsterdam have been in force since 1<sup>st</sup> May 1999. It should be noted that accordingly the recommendation mentioned in the previous note could not even have referred to it.

<sup>7</sup> This is the Cullen International Company in Namur which from this year has been instructed by the European Commission to construct a web site showing all the European legislative initiatives in the fields of multimedia and e-commerce ([http://europa.eu.int/information\\_society/topics/telecoms/regulatory/studies/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/studies/index_en.htm)).

May 2001 on combating fraud and counterfeit means of non-cash payments or the proposal put forward by the Commission on 12 December 2000 concerning the use of the generic domain name "eu".

Although the number of interventions is noteworthy, more remarkable still is the rapidity of the adoption procedures followed by directives and the short transposition times imposed on Member States. When one is aware of the many hazards that litter the obstacle course run when a directive is adopted,<sup>8</sup> one might consider that the 18 months required to adopt a directive as important as the one concerning certain aspects of e-commerce are no mean achievement.<sup>9</sup> The time limit for transposing directives on such matters is often 18 months<sup>10</sup> and not the usual three years. I might add that a number of directives make provision for amendment processes, some of which are short-term, in their very wording or in the preamble.<sup>11</sup>

The concern to respond quickly to the needs of the market and its development certainly explains the haste of the European authorities, in particular the Commission, which has no hesitation in using processes that are faster and under its sole control when it feels the need. Accordingly, the Commission uses the route of recommendation together with the threat of a directive when the provisions of that recommendation are not followed.<sup>12</sup> In any event, it is a

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<sup>8</sup> In this talk, we cannot analyse the provisions laid down in the Treaty on the European Union concerning the adoption of a directive (see in particular, Article 251 on the co-decision procedure). The reader is referred to the numerous works on European law concerning those provisions.

<sup>9</sup> In this particular case, the proposal for a Commission directive was issued on 18 November 1998; the vote on the first reading of the European Parliament on 6 May 1999; the Commission's amended proposal issued on 1<sup>st</sup> September 1999 was the subject of a Council policy agreement on 7 December 1999, and a joint position was adopted on 28 February 2000. Parliament's final vote on the second reading took place on 4 May and the directive adopted by the Council and Parliament on 8 June was published in the Official Journal on 17 July, \*.

<sup>10</sup> The deadline for transposing the e-commerce directive was accordingly fixed for 17 January 2002. The same time-limit was valid for the directive concerning electronic signatures. To be noticed more recently the 13 months time-limit fixed for implementing the Directive 2002/58 of July 12, 2002 on privacy and electronic communication sector.

<sup>11</sup> See in that respect, the significant example of the so-called e-commerce directive which provides for a reassessment of the provisions on the liability of intermediaries and on exceptions in the case of notarial and other instruments; the preamble to the directive known as "copyright and related rights" provides for assessment of the impact of the provisions with regard to changes in new technology and maintenance of the traditional balances between protecting authors and the circulation of ideas.

<sup>12</sup> Two examples: 1) recommendation (COM(97)353 of 9 July 1997) on transactions concerning instruments of electronic payment and in particular the relationship between the issuer and the bearer which calls for measures to be taken by issuers before 31 December 1998 with an assessment of its implementation and proposals for a directive if that implementation is insufficient and unsatisfactory. On 20 March of this year, the Commission published the study assessing that implementation (conducted by the CRID of FUNDP and the Centre for Commercial Studies of Queen Mary College London) which underlined that the European recommendation had not been correctly applied. 2) recommendation (COM 2001/310/EC) on the "principles for out-of-court bodies involved in the consensual resolution of consumer disputes", published on 4 April 2001. It must be recalled that according with the Grimaldi Decision of the European Court of Justice (C-322/88, Rec.I-4407), "The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions."

question of moving quickly ... at the risk of going too fast and not weighing up the impacts of the decisions made and the sometimes foreseeable changes in technological contexts.<sup>13</sup>

## 2 Areas of European involvement and their specific features

### a) *Concerning e-commerce operators and transactions or how to ensure confidence?*

#### aa) *The basic directives*

Two directives establish the basic overall principles peculiar to players and transactions in e-commerce: the Directive of 8 June 2000<sup>14</sup> on certain legal aspects of e-commerce and that of 13 December 1999<sup>15</sup> on the legal protection of electronic signatures.

Without claiming to be exhaustive, let us look at some of their principles. It will be noted that so far as concerns players, access to the market by operators of information society services<sup>16</sup> cannot be subject to any additional conditions other than those that already exist for the non-electronic supply of the same services. However, let us note that operators of services that certify electronic signatures may be subject to conditions of interoperability and checks to ensure that they comply with certain conditions if they want the signatures for which they issue certificates to have a particular evidential value. That principle of free access is only tempered by increased obligations for transparency and for a procedural approach of the electronic transactions. These two principles are considered as fair compensation for the fact that supply and demand on the Internet are not "face to face" and by the rapidity of what are called "click transactions". Accordingly with this "transparency" requirement a provider of services to the information society will be asked to give details of his identity, his location and means of getting in touch with him and he will be forced to provide direct and easy access to the terms and conditions, codes of conduct and others by which he agrees to abide. The procedural aspect of the electronic transactions is ensured by the creation of different steps, which are needed for the conclusion of the contract in order to make sure that the consent is informed, complete and certain.

So far as concerns e-commerce transactions, a major principle is the obligation placed on Member States not to directly or indirectly categorise e-commerce transactions by legal requirements affecting the value, effectiveness or binding force of the use of electronics, at any

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<sup>13</sup> In that respect, we can but reinforce the thoughts of *Lessig, L.*, *The laws of cyberspace*, available on-line at the following address: <http://cyberlaw.stanford.edu/lessig/content/index.html>. This author pleads clearly for a cautious attitude of the legislators not regulating too rapidly. The adoption of the Directive on privacy and electronic communication sector in 2002 less than five years after the first directive on the same topic (the 1997 Telecommunications data Protection Directive) is a clear evidence of this concern.

<sup>14</sup> Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 concerning certain legal aspects of the Information society services, in particular electronic commerce in the internal market (the Directive known as "electronic commerce").

<sup>15</sup> European Parliament and Council Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures (the Directive known as "electronic signature").

<sup>16</sup> It will be noted that so far as concerns the basic principles, the traditional distinction between "traders" and "the professions" and "non-traders" has been abolished.

time of the transaction.<sup>17</sup> That principle of non-categorisation is also valid for electronic signatures and it is even added that in some circumstances an electronic signature can be given the same the legal value as that of a handwritten signature.

How can we fail to see the emergence of a European contract law through these various provisions? Indeed, the European authorities resist it and emphasise unrestrainedly that their involvement is limited, dictated by the law of subsidiarity. However, the Commission recently launched a debate on European contract law.<sup>18</sup> According to the discussions, the Commission “wonders, in particular, whether the problems connected with entering into, interpreting and enforcing cross-border contracts might interfere with the smooth functioning of the internal market.” Is the reply not already contained in the question? That is the view of the European Parliament when, in its resolution of 16 March 2000 concerning the Commission’s working programme for 2000, it declares: “a more extensive harmonisation in the field of civil law has become essential in the internal market.”<sup>19</sup> First elements of this European Contract Law might be found in the recent European Communication of July 11, 2001 on European Contract Law.<sup>20</sup>

*bb) Concerning some aspects or specific transactions*

The European Union supplements the framework proposed by the two directives analysed above with provisions that concern consumer protection and so-called electronic money.

With regard to the first, the European conviction that expansion of the information society necessarily requires consumer confidence,<sup>21</sup> justified both affirmations of principles, such as Council of Europe Resolution of 19 January 1999 concerning the “consumer” dimension of the information society, a veritable charter of consumer – Internet users’ rights,<sup>22</sup> and the

<sup>17</sup> In our view, that principle will not mean abandoning “formality” in contracts but rather seeking functional equivalents to the traditional formalities based on the conventional model of the paper document. See in that respect, *Gobert*, and *Montero*, *Les contrats conclus par voie électronique* (Contracts entered into by electronic means), in *Le commerce électronique sur les rails*, in M. Antoine and others, CRID Report, n° 19, 2001, p. 240 et seq.

<sup>18</sup> Commission communication to the Council and European Parliament concerning the law of contracts, Brussels, 11 July 2001, COM (2001) 398 final. That communication is based in particular on the work of the Pavie Group which recently published the work: “European Contract Code: Preliminary Draft” (Univ. of Pavie, 2001).

<sup>19</sup> O.J. C.377, 29/12/2000, p. 323. The resolution makes explicit reference to the changes in the technological context to explain this need.

<sup>20</sup> The Legal Affairs Committee of the European Parliament had a first vote (July 8, 2003) on the Action Plan for a more coherent European Contract Law proposed by the Commission .

<sup>21</sup> That conviction is forcefully reiterated in the European Commission’s comments in its reply dated 21 April 1999 to the request from the American FTC for academic reactions and comments published following the FTC’s report: “US perspectives on Consumer Protection in the Global Electronic Marketplace, US Federal Trade Commission Notice requesting academic papers and public comments”.

<sup>22</sup> The Resolution of the Council of Ministers responsible for consumer matters on 19 January 1999 reiterates numerous principles, *inter alia*

- the principle of transparency and the right to receive sufficient, reliable information before and after the transaction;

adoption of legislation with a more direct normative value. In that respect, it will be noted that the Directive of 20 May 1997 concerning distance contracts which extends to the world of electronic commerce a set of obligatory rights asserted for any transaction carried out at a distance and obliges the supplier of services to issue a record of the transactions conducted by electronic means on a “durable medium”.<sup>23</sup> Similarly, a directive is shortly expected concerning distant marketing of financial services (including insurance services) aimed *inter alia* at consumers<sup>24</sup> and manifestly broadening the obligations for transparency and information, the time-limits for a period of reflection and withdrawal and making provision for effective and adequate processes for complaining and resolving disputes. Those services include making distance payment services available, which introduces the second subject. More recently the European Commission has proposed<sup>25</sup> a new approach as regards the consumers’ protection through a regulation of Unfair B-to-C commercial practices, which are defined under this proposal as practices, which are contrary to the professional diligence and materially distort the “average European consumer” economic behaviour. Furthermore misleading and aggressive commercial practices are prohibited.

The second subject, which has seen significant normative intervention by the European authorities, is, in fact, as we have said, electronic money,<sup>26</sup> another essential factor in the development of e-commerce.<sup>27</sup> The European Commission’s communication and recommendation of 9 July 1997 have already been mentioned. In addition to the obligations for information about the method of payment used and its consequences, they introduce clear rules on the distribution of liability between the issuer and the user of the method of payment, in the case of theft, fraud, loss or error as well as efficient mechanisms for settling disputes. Directives have been adopted or are in the process of being drafted. Two directives dated 18 September 2000 are designed, firstly, to harmonise national legislation relating to credit institutions by

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- the principle of non-discrimination in access to products and services and that of protecting vulnerable consumers;
  - the principle of fair distribution of risks and responsibilities;
  - the principle of the involvement of consumer organisations in the protection of consumer interests;
  - the principle of informing and educating consumers, designed to make them capable of developing the appropriate *savoir-faire*; ....

<sup>23</sup> On this important concept, read *Demoulin, M.*, “La notion de “support durable” dans les contrats à distance : une contrefaçon de l’écrit ?”, REDC, 2000, p. 361 et seq.

<sup>24</sup> Proposal for a Directive from the European Parliament and Council concerning distance marketing of financial services to consumers, and amending Directives 90/619/EEC, 97/7/EC and 98/27/EC.

<sup>25</sup> European Commission proposal for a Directive of June 17, 2003 concerning Unfair B-to-C commercial practices in the Internal market.

<sup>26</sup> Concept defined as follows by Parliament and Council Directive (2000/28/EC) of 18 September 2000 amending Directive 77/780/EC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions. “Monetary value as represented by a claim on the issue which is:

- stored on an electronic device
- issued on receipt of funds of an amount not less than the monetary value issued;
- accepted as means of payment by undertakings other than the issuer.”

<sup>27</sup> See Communication from the Commission on electronic commerce of 16 April 1997 (COM(97) 157): “A European initiative on electronic commerce.” The Commission noted that electronic commerce would not develop “without robust, user-friendly, efficient and safe methods of electronic payment.”

extending the number of institutions capable of issuing electronic money<sup>28</sup> and secondly, to check those institutions' transactions. It is a matter of making sure that issuers of payment are stable and robust whilst distinguishing between the various systems in accordance with the risks connected with the type of method of payment issued including the use of Mobile systems.<sup>29</sup> The main objective of these initiatives is to create through Europe a Single Payment Area through the development of a unified legal framework for retail payments.<sup>30</sup>

Besides those initiatives, I would add the European authorities intention to combat fraud and counterfeiting means of non-cash payment, particularly by preventative measures.<sup>31</sup>

*b) Concerning human rights and fundamental freedoms: a difficult balance between "freedoms" and "security" of the network.*

Both Europe and the United States recognise freedom of expression as one of the Internet's fundamental values. However, these two areas of the world are faced with the need to set some limits to that freedom when it is abused through illegal or harmful content that harms others. It is important to emphasise some nuances amongst the responses proposed by these two regions.

This difference in approach is even more discernible when one considers the problem of protecting personal data. As borne out by the Directive of 24 October 1995, the European Union considers this issue to be crucially important whereas, subject to some specific laws, the United States refuses to provide the appropriate legislation. The increase in risks that harm private life caused by the use of modern communication networks has led the European courts to propose new legislative measures. As various recent declarations show, Europe has repeated that it considers the protection of personal data to be "the key issue in the development of the information society."<sup>32</sup> Accordingly, the second point examines the specificity of the European approach both with regard to freedom of expression (a) and the issue of protecting personal data (b).

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<sup>28</sup> One might consider telephone network operators, or indeed more widely, distributors of goods or services. I would add that in the communication on electronic commerce of 16 April 1997 already referred to, the European Commission had emphasised the importance of ensuring full competition between traditional issuers and the newcomers.

<sup>29</sup> See EU Blueprint on Mobile payments, EU Commission Working Document of June 12, 2003.

<sup>30</sup> A working Document has been issued by the Commission on that issue the 14<sup>th</sup> of May, 2002 followed by a recently published (July 2003) on the obstacles to cross-border payments.

<sup>31</sup> In that respect, see the following 3 documents:

- Communication from the European Commission of 1<sup>st</sup> July 1998. "A framework measure to combat fraud and counterfeiting of non-cash means of payment."
- Framework decision of the European Council of 28 May 2001, bearing the same title as the first document cited.
- Commission communication COM(2001)11 of 9 February 2001: "Preventing fraud and counterfeiting of non-cash methods of payment."

<sup>32</sup> It noteworthy that American surveys broadly confirm the European authorities' feelings. Accordingly, the Americans questioned affirm that the risks connected with the use of their personal data are the major obstacle to wider use of Internet services.

aa) *The delicate balance between freedom of expression and other fundamental values in European legislation*

The introduction of any form of censure of the Internet is one of Europe's main concerns. As shown in Articles 14 and 15 of the directive on certain legal aspects of electronic commerce, which, following the American model,<sup>33</sup> strictly limit the responsibility of intermediaries in relation to the content they host and exonerate them from any obligation to carry out preventative checks on that content.

Although the principle of freedom of expression is clearly laid down, the need to combat illegal or harmful content, particularly child pornography, led the European Union to define how it balanced freedom of expression with the other values mentioned in Article 10 of the European Convention on Human Rights.

That balance is achieved through various pieces of legislation:<sup>34</sup> the 1996 Green Paper followed by Council Recommendation of 24 September 1998 on the development of competition in the audiovisual and information services industry by promoting national systems aimed at achieving comparable and effective protection of minors and human dignity, a recommendation which has recently been assessed;<sup>35</sup> then the communication of 16 October 1996 on illegal and harmful content on the Internet, followed by a Council and Parliament decision on 25 January 1999 "adopting a multi annual action plan to promote safe use of the Internet by combating illegal and harmful content on the global networks"; finally, Council decision of 29 May 2000 concerning the fight against child pornography on the Internet.

The European position can be summarised as follows. Certainly the first provisions adopted in the aftermath of the American decisions following the declaration that the Decency Act was unconstitutional refer exclusively to self-regulation and technological developments to ensure the development of a "secure network." Gradually, the State's involvement is more insistent, firstly, by imposing a framework to the self-regulatory initiatives,<sup>36</sup> secondly, by introducing maximum cooperation between Internet operators and public authorities in so far as the legislation imposes on the former the obligation to keep a record of each

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<sup>33</sup> With regard to the American origin of the European provision and a comparison of the two texts, read *R. Julia Barcelo, R. and Koelman, K.J., Intermediary Liability in the e-commerce directive: so far so good but it's not enough*, *Computer Law and Security Report*, 16, n°4, 2000, p. 213-239.

<sup>34</sup> For a commentary on these provisions and a discussion on regulation of Internet content, read *d'Udekem-Gevers, M., and Poulet, Y., Concerns from a European User Empowerment Perspective in Internet Content Regulation, Communications and Strategies*, 2001, n° 43, pp. 143 et seq.

<sup>35</sup> On 27 February of this year, the European Commission adopted the evaluation report, which proposed a heterogeneous implementation of the 1998 recommendation.

<sup>36</sup> Accordingly, in an appendix, the recommendation of 24 September 1998 already referred to sets out "guidelines for the development of national self-regulation systems."

person's use as a precaution<sup>37</sup> and finally, by the obligation placed on intermediaries to set up their own control system for child pornography at least.<sup>38</sup>

The recent discussions that have taken place in Europe<sup>39</sup> following the Council of Europe's adoption of a Convention on Cybercrime in November 2001, show that the trend observed with regard to messages relating to child pornography, that is to say a freedom of expression under a control that takes place *a posteriori* resulting from the cooperation imposed between public and private authorities, will henceforth be aimed at all computer crime (infringement of data protection, economic crimes such as sabotage, unauthorised access, infringement of copyright, cybersquatting, defamatory, racist or xenophobic messages). The eEurope Action Plan that was adopted by the European Council in June 2000 highlighted the importance of network security and of the fight against cybercrime. A Directive on attacks against information systems is expected before the end of the year.<sup>40</sup>

*bb) The protection of personal data*

The Green Paper on the convergence of the telecommunications, media and information technology sectors, better known as the "99 Review" highlighted the absolute necessity to review Directive 97/66/EC of 15 December 1997 on the processing of personal data and protection of privacy in the telecommunications sector, in view of the additional risks created by technological advances.

For Europe it was a question of maintaining the requirement for a "high degree of protection of personal data", considered to be an absolute necessity to guarantee the confidence of users in relation to development of the information society.<sup>41</sup>

The newly adopted Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector<sup>42</sup> broadened the special protec-

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<sup>37</sup> This obligation to keep a record is explicit in Council Decision of 29 May 2000. The Council of Europe Convention on cybercrime adopted ... gives a legal basis for this requirement for information services operators to keep a record of traffic data and allow the police and judicial authorities to access it.

<sup>38</sup> See in that respect, Council Decision of 29 May 2000 to combat child pornography on the Internet, which, let us note, contradicts Article 15 of the directive on some legal aspects of electronic commerce which exonerate intermediaries from the obligation to introduce surveillance measures.

<sup>39</sup> See in that respect, the Commission's communication of 26 January 2001 on the creation of a more secure information society by improving the security of information infrastructures and combating computer crime, followed by a public hearing (7 March 2001), a discussion in the Council of Ministers (16 March 2001) and taken up by the European Parliament in the "Freedoms and rights of citizens" (19 June 2001) and Legal Affairs Committee (26 June 2001).

<sup>40</sup> The European Commission proposal for a Council Framework Decision of April 19, 2002 on attacks against information systems, is presently in discussion before the Parliament (see the "common Approach" adopted the 28<sup>th</sup> of Feb. 2003 ). This proposal does notably contain a list of offences and provides the sanctions related to each of these offences. It defines rules as regards the competence of the EU member states jurisdictions and the cooperation between EU law enforcement agencies.

<sup>41</sup> In that respect the opinion of the Economic and Social Committee on the effects of electronic commerce on the single market" (OMU – Single Market Watchdog) (Doc. 2001/C 123/01, O.J., 25.4.2001): "The Community must give absolute priority to data protection."

tion afforded tomorrow not only to telephone networks but also to all mobile, satellite or cable networks. It imposes heavier duties on all service providers of electronic communications offered to the public, particularly security and confidentiality. As far as concerns the processing of details about traffic and location, it significantly limits the right of service providers to process them without the user's consent, requires the latter to provide information and, finally, introduces an opt-in system for unsolicited e-mail communications.<sup>43</sup> Finally, the Commission reserves the right to impose technical standards with regard to the terminal equipment if it were to find "invasion of privacy" practices, notably through the use of invisible processing.<sup>44</sup>

Finally and perhaps more important, the EU Charter on Human Rights clearly recognizes data protection as a separate and autonomous constitutional right distinct but placed on the same footing than privacy.<sup>45</sup> This distinction is quite important insofar as it means that EU enlarges considerably the scope of the Council of Europe Convention article 8. To summarize EU authorities do envisage not only the protection of the intimacy of the data subjects or of their correspondence but more broadly consider as a constitutional right of public order the right of each individual to self determination which means the transparency of the data processing, the legitimacy requirements as regards the processing of personal data and definitively the intervention of an independent authority to control the respect of these principles.<sup>46</sup> These principles are applicable not only to the public sector but also to the private sector which is still discussed under article 8 of the Council of Europe Convention. Doing so, the EU Charter follows the extension given by the Directive and the national legislations on privacy and gives to the principles embodied in these legislations a constitutional character.

*cc) On intellectual property and related rights: from affirmation to doubts.*

An analysis of the relevant European trends shows a hesitation between two desires: on the one hand, to ensure maximum protection of the investment, beyond the traditional area protected by intellectual property law; on the other, to maintain a legal system for protection which is consistent with the way in which the traditional paradigms of intellectual property

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<sup>42</sup> For a comprehensive analysis of this directive, see *Louveaux, S., and Perez-Asinari, V., New European Directive 2002/58 on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector – Some Initial Remarks (2002)*, CTLR, 5, p. 133 et seq.

<sup>43</sup> This point is highly controversial. A study of the impacts of such a choice is underway.

<sup>44</sup> The so-called Article 29 Group made a recommendation concerning the risks connected with invisible processing (a group made up of representatives of data protection authorities set up by Article 29 of Directive 95/47/EC already mentioned) "Invisible and automate processing of personal data on the Internet performed by software and hardware" (Recommendation 1/99 on Invisible and Automatic Processing of Personal Data on the Internet Performed by Software and Hardware, 23 February 1999, W.P. 17), available on the web site [http://europa.eu.int/comm/internal\\_market/en/dataprot/wp.does/wp.does\\_99/htm](http://europa.eu.int/comm/internal_market/en/dataprot/wp.does/wp.does_99/htm).

<sup>45</sup> Article 7 is dedicated to the right to Privacy; article 8 to data protection.

<sup>46</sup> On all these points, see Poullet, Y., *Le droit et le devoir des Etats, Membres de l'Union européenne de veiller au respect de la protection des données dans le commerce international, XXVe anniversaire Hispania Constitutione*, Dykinson (ed.), 2003, to be published.

law guarantee a fair balance between the interests of the “authors” or their “heirs” and users of the work or indeed the community in general.

Directive 96/9/EC of 11 March 1996 on the legal protection of databases certainly fits into the first trend. It creates a law “*sui generis*” for protecting databases, which it is acknowledged, are not covered by copyright laws. We know how much American literature has been up in arms against this European deviance, which clearly protects the investment and no longer protects the intellectual creation.

The same tendency is shown in Directive 98/84/EC of 20 November 1998 on the legal protection of conditional access services such as pay-for-view television but also any multimedia service that is accessible on the basis of an individual licence for which access is protected by technical devices such as encryption. Independently from any legal protection of such private content, the Directive provides that the technical measures for protection are in themselves a subject worthy of protection. Accordingly, technical protection becomes the source of legal protection of a work, which in itself is not necessarily done of protection by law and guarantees controlled access to the work.<sup>47</sup>

Unlike this tendency which admittedly satisfies information society service providers’ lobbies and, more widely, promoters of the electronic publishing market, other provisions prove to be more concerned with improving the circulation of works and programmes. Accordingly, European Parliament resolution of 22 October 1998 clearly advocates supporting free software and open, interoperable platforms.<sup>48</sup> More recently, it has been pointed out that the Parliament and Council directive, adopted on 9 April 2001<sup>49</sup> after lengthy and difficult debates, a directive on copyright and related rights in the Information Society, finally sets out the right of Member States to prescribe exceptions to authors’ monopolies (the right to reproduce or communicate to the public). Those exceptions, which, admittedly, were proposed as an option, can be justified by private use, the benefit to public educational institutions, use for research purposes, quotation, journalism, etc. Similarly, the directive limits the protection that might be afforded by technical measures.<sup>50</sup>

Admittedly, it is for each country to incorporate those reservations into its national legislation thereby ensuring the traditional balance that copyright legislation provides between the legitimate interests of the creators (or their heirs) and those of society, to the advantage of some players such as research, education, the press, etc. On that point a discussion has been

<sup>47</sup> In that respect, the reader is referred to the results of the workshop on this topic during the XXVth anniversary of Crid in November 1999 and published under the direction of Séverine Dusollier, *Towards a law of access to works*, CRID Report, n°18, Bruylant, Brussels, 100 pages.

<sup>48</sup> That resolution follows on from the Commission’s Green Paper (COM (97)263) of 3 December 1997 concerning the convergence of the telecommunications, media and information technology sectors and its implications for the regulation.

<sup>49</sup> Published on 22 June 2001 in the Official Journal.

<sup>50</sup> On the limits to be imposed on the protection provided by technical measures, read *Dusollier, S., Pouillet, Y., Buydens, M.*, Report to the UNESCO’s 3<sup>rd</sup> “Infoethics” colloquium available on the CRID’s website; <http://www.crid.be> or at the Unesco website.

launched by the Commission<sup>51</sup> about the impacts of the Electronic Copyright management systems (E.C.M.S.) in order notably to prevent that legitimate users will not be deprived from their legitimate uses and that privacy requirements are fully respected.

As regards the patentability for computer-implemented inventions the main principle of the draft proposed Directive<sup>52</sup> seems not to grant patent protection to computer programs “as such” but to adopt a more restrictive approach and notably to require a real “technical contribution” to the state of the art.

Having thus defined the limits of protection of Internet content, the European authorities are quite legitimately adopting the necessary measures for more effective legal protection by improving cooperation between the government authorities responsible for detecting and punishing acts of piracy or counterfeiting.<sup>53</sup>

## **II. The mechanisms introduced for Europe to ensure that the closest possible unification in national legal systems and their implementation**

It is trivial to set the global nature of the Internet against the existence of multiple national legal systems. This multiplicity of legal systems is harmful to the development of the information society. For the service provider whose service can be accessed from several points of the globe, it creates uncertainty as to the legislation likely to be relied on by the Internet user-consumer or simply contracting party; for the latter, it increases the administrative difficulties of a claim and reduces the chances of rapid, effective enforcement of any judgements made.

Those findings led the European courts to simultaneously develop a vigorous unification policy presented in Section I as well as procedures designed to prevent distortions of content between legal systems. It is a matter of controlling national legislation in a preventative manner and limiting the national margin for manoeuvre. That subject will be analysed in point I of this section.

To this policy, which is directed at the reference legal framework, one must add (this will be point II of this section), the European initiatives designed to encourage the creation of a single area of jurisdiction, which guarantees easy enforcement of compliance with the established rules. Three points will be highlighted in that respect:

the recognition of foreign judgements;

administrative cooperation between Member States;

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<sup>51</sup> A Working paper has been issued on this topic (Feb. 14, 2002). It has been followed by different workshops organized by the Commission.

<sup>52</sup> European Commission Proposal for a Directive of Feb. 20, 2002 on the patentability of computer implemented Inventions, The adoption of the Directive is expected before the end of 2003.

<sup>53</sup> See, in that respect, Parliament resolution of 4 May 2000 following on from the Commission’s Green Paper of 15 October 1998 “Combating counterfeiting and piracy in the single market” and this same Commission’s communication dated 30 November setting out practical measures for combating them and a proposal for a directive for the harmonisation of national measures.

finally, the promotion of out-of-court systems for resolving disputes.

1. From the “Cassis de Dijon” judgement to the “Transparency” and “Electronic Commerce” directives<sup>54</sup>

Since the famous Cassis de Dijon judgement,<sup>55</sup> the traditional case-law of the Court of Justice of the European Communities so far as concerns divergences between the regulations of Member States and the creation of a single market, can be summed up as follows:

- The Court takes a positive view of the existence of divergent legal systems, considering them to be an aspect of competition necessary to the dynamics of a single European market;
- in particular, using the so-called “equivalence” principle, the Court identified from the Treaty, in a number of judgements relating to more or less analogous facts (the ban by a Member State on importing any service or product because it does not comply with the regulations of the country of importation or non-approval of those products or services in accordance with that country’s rules of law) a principle that can also be applied to trading in goods, the supply of services or carrying out paid work in a Member State other than the country of origin. That principle prohibits the national authorities from imposing material requirements or measures for control whose effect is equivalent to that of the measure already deployed by the Member State from whence the goods, person or service in question originates.”
- however, limits<sup>56</sup> are set on the variations accepted by application of the so-called rule “of reason”. Accordingly, Member States can intervene and restrict importation or subject it to conditions when the legislative requirements imposed by the country of importation fulfil the conditions of necessity, causality and proportionality<sup>57</sup> in relation to the objectives which, in some cases, are already specified in the Cassis de Dijon judgement and supplemented thereafter by other decisions: the effectiveness of fiscal controls, the protection of public health, fair trading and consumer protection.

Accordingly it is in view of the obstacles conceded in the abovementioned circumstances that European action for harmonisation is justified. That European harmonisation may be achieved by mechanisms for mutual recognition, be minimal (encouraging stricter national measures), optional (leaving the Member States various options) or total.

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<sup>54</sup> This part of the report is based on the excellent article by *van Huffel*, “Protection du consommateur et commerce électronique: quelques réflexions au départ du droit de la concurrence”, *Revue Ubiquité*, n° 5, 2000, pp. 119 et seq.

<sup>55</sup> C.J.E.C., 20 February 1979, Digest 1979, p. 649.

<sup>56</sup> *Van Huffel*, art. quoted, p. 20 and the numerous references referred to therein.

<sup>57</sup> The national measures liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it, CJEC, 30 November 1995, case C-55/94, *Gebhard.*, Rec. 1995, p. 14165.

The various measures for harmonisation referred to in Section I show that so far as concerns legislation for information society services, the European Union took the view that there were numerous possibilities for obstacles liable to be justified by the rule of reason whereas it considers that it is absolutely necessary to create a market for information society or electronic communication services operating on rules that are more or less identical. That conjunction of arguments explains the increase in European actions and accordingly, it will be understood that although some of the measures for harmonisation mentioned refer to minimal<sup>58</sup> or optional measures,<sup>59</sup> the majority are total.<sup>60</sup>

Apart from this increase in so-called harmonisation legislation, Europe is introducing mechanisms aimed at preventing variations in legal systems when new regulations are adopted in Member Countries. It is a question of preventing national legislative measures for information society services that would run the risk of creating impediments but also by that preventative analysis, of detecting, where appropriate, areas where harmonisation is necessary and taking action if needs be.

In that respect, Directive 98/48/EC of 20 July 1998 on transparency<sup>61</sup> is noteworthy. Taking the view that the harmonisation of rules concerning information society services decreed *a priori* by the Community authorities is too risky not to say premature, the directive introduces a Community level system of control and coordination of any relevant national measure. That prevents fragmentation of the internal market, legislative inconsistencies or a frenzy of legislation, which would slow down the development of the information society.

Accordingly, the directive obliges Member States to subject any draft legislation relating to an information society service, a concept with a very broad definition, to a procedure for notifying the Commission. The notification suspends the national procedure for 3 months. That period allows the Commission and other Member States to issue comments or indeed "detailed opinions" (the latter being binding in relation to the Member State that took the initiative) on any aspect of the initiative taken that might have an effect on the free movement of services or the freedom of establishment of operators of those services.

Issuing such "opinions" extends the suspension. The Commission is also entitled to extend the suspension by invoking the existence of a proposal for Community legislation.

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<sup>58</sup> Accordingly, Directive 97/7/EC on distance contracts introducing minimum rules, authorises Member States to regulate distance contracts beyond the minimum threshold set by the directive.

<sup>59</sup> Accordingly the Directive 2001/ \* /EC on the harmonisation of certain aspects of copyright and related law in the information society leaves it for each Member State to lay down the exceptions to the law of reproduction or communication from a list specified by the directive.

<sup>60</sup> Accordingly directive 99/93/EC on electronic signatures is a directive for total harmonisation. In addition, it includes an "internal market" clause which prohibits restrictions on the provision of certification services originating from another Member State.

<sup>61</sup> This is a directive that amends for the third time directive 83/89/EC laying down a procedure for the supply of information in the field of technical standards and regulation. It is to be noted that at the outset, Directive 83/89/EC was only concerned with technical standards. Directive 98/48 broadens the field to all the regulations.

The directive 2000/31/EC known as “electronic commerce” goes even further. Article 3 thereof affirms the principle whereby operators of information society services are subject to the legislation and control of the countries in which they are established.<sup>62</sup> Their compliance with that legislation entitles them to offer the service throughout the whole of the European Union.

The other Member States may only object to such an offer for reasons of public order as specified in the directive<sup>63</sup> using proportionate measures.<sup>64</sup> The directive adds that those measures may only be taken after establishing that there is no prompt reaction from the country of origin and after notifying the Commission, which may take specific legislative measures to resolve the issue.

Thus, not only is the European Union gradually standardising the rules but more importantly, through mechanisms that oblige Member States to notify it of their draft legislation, it reserves the right to intervene if needs be when it finds that an existing or draft national piece of legislation, not to say the threat of implementing it, runs the risk of creating an obstacle to the creation of a single European market for information society services.

In that respect, it will be noted that these possibilities for preventative intervention will endow the European Commission with powers which hitherto were only granted to the European authorities within the framework of a claim that was a posteriori based, as we said on the rule of reason.

That intervention, which the European authorities will say is legitimised by the very characteristics of the supply of on line services, in particular their ubiquity and ability to easily be freed from the constraints of locality, nevertheless raises the question of the limits of Euro-

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<sup>62</sup> However, as noted in the recommendations for the 2<sup>nd</sup> reading (European Parliament, 12 April 2000, Final A5-0106/2000, p. 11), this Article 3 of the directive cannot be interpreted as a rule of private international law. However, note the same passage: “As Parliament requested, the common position now leaves no doubt as to the supremacy of the directive on international private law since it provides that, even though that directive does not in itself constitute an additional rule of private international law, the implementation of that law must not have the effect of restricting the free movement of information society services as laid down in the directive.” With the exception of some particular fields, for which explicit derogation is provided, the directive will state that the information society services are normally subject to the national law of the Member State in which the service provider is established and that the other Member States in which these services may be received shall not restrict the free supply of information society services. Accordingly the directive will apply the principle of “mutual recognition” of national legislation in the “relevant field”, that is to say “the requirements applicable to information society service providers or to information society services.” The proposed directive will establish specific harmonised rules in the fields in which it is necessary for businesses and citizens to be able to supply and receive information society services throughout the whole European Union, regardless of borders. Accordingly, the proposal strives to remove the barriers caused by the obstacles to the supply of on-line services by concentrating on five key areas.”

<sup>63</sup> In fact the text of the directive gives a restrictive list of these reasons of public order.

<sup>64</sup> On Article 3 and its interpretation, read Cruquenaire, A., “La clause de marché intérieur: clef de voûte de la directive sur le commerce électronique”, in *Le commerce électronique européen sur les rails? Analysis and proposals for implementing the e-commerce directive*, Cahier du CRID n° 19, [\* year of publication], p. 41 et seq.

pean intervention. The principle of subsidiarity<sup>65</sup> of European involvement in those fields that do not fall within its sole jurisdiction was affirmed by the recent European Union treaties.<sup>66</sup> Although it is clear that in that respect it is for the European authorities, particularly the Commission, to prove the need for a specific action at Community level rather than at national, regional or local level, in matters of information society services, such proof would appear to be quickly established and the suitability of the methods of Community intervention to the aim pursued immediately affirmed.<sup>67</sup> The intrinsic “trans-national” aspect of activities concerning such services would indeed seem to be an indication of this Community added value.<sup>68</sup>

Is this harmonisation thus legitimised and justified, effective? The Commission increases its observations and recommendations to Member States during the difficult exercise of transposing Community legislation. Will this European monitoring of transpositions prevent the work of European integration being destroyed in the future?

## 2. Towards a single European “judicial” area

Apart from the standardisation of substantive law, covered in point I, the introduction to the section mentioned three areas of involvement in which Europe intended to contribute to a common legal area and beyond that a common judicial area. Initially, it is a question of making it easier to bring an action before the courts of appeal and courts of other countries in the European Union and making the judgements made by those courts easier to enforce. It is true that European action in such cases cannot only be explained by the development of on line transactions, however we need to recognise that the development of electronic commerce and

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<sup>65</sup> “Generally speaking, applied to the institutional field, the principle of subsidiarity means that in a given entity (Country or federation of States), the higher level of the political corps only acts when the action being considered can be taken more effectively at that level than at a lower level, having regard to its dimension or its effects. That principle based on common sense is designed to ensure that judgements are made as close as possible to citizens. It would appear that there is a need to place the methods of intervention in hierarchical order: local, regional, national, European, not forgetting international. The principle of subsidiarity can thus be understood as a “multilevel” principle.” (*van Raepenbusch*, “Droit Institutionnel de l’Union et des Communautés européennes”, 3rd. Ed., 2001, p. 128). On that principle, amongst others, *Gaudissart*, “La subsidiarité: facteur de désintégration européenne?”, *J.T.*, 1993, 173; *Lenaerts*, The principle of subsidiarity and the Environment in the E.U.: Keeping the Balance of Federation, *Fordham International Law Journal*, 1994, p. 846 et seq., etc.

<sup>66</sup> In particular by Article 5 para. 2 and 3 of the European Community Treaty: In areas that do not fall within its sole jurisdiction, the Community, in accordance with the principle of subsidiarity, only acts, if and to the extent that the aims of the envisaged action cannot be achieved sufficiently by the Member States and therefore, because of the dimensions or effects of the envisaged action, can be better achieved at Community level.” The Community’s action does not go beyond what is necessary to achieve the objectives of this treaty.”

<sup>67</sup> Accordingly, the least binding methods of intervention must be favoured: e.g. “minimal” harmonisation in preference to mutual recognition or total harmonisation.

<sup>68</sup> ...and this even if it means overturning, as the “transparency” and “e-commerce” directives do, the presumption of sufficient capacity to act at national level.

the resulting increase in cross-border transactions has precipitated discussions on the subject, both at European<sup>69</sup> and international level.<sup>70</sup>

The Council regulation of 22 December 2000<sup>71</sup> on the jurisdiction and enforcement of judgements in civil and commercial cases proposes some amendments to the 1968 Brussels Convention. Accordingly, it sets out the hypothetical situations in which the consumer might benefit from derogations to the principle of jurisdiction of the court in the place where the defendant is resident and, above all, makes the procedures for enforcing the foreign judgement in the country of the party seeking enforcement easier. More recently, a Green paper has been issued by the E.U. Commission<sup>72</sup> in order to revise the 1980 Rome Convention on the law applicable to contractual obligations. To be underlined thereabout, are the rules proposed in favour of a better protection of consumers by the enlargement of the concept of supplier directing its activities towards foreign countries and an updating of the rules regarding the validity of contract.

The two other areas of intervention deserve to be examined more closely in that the European regulations are directly aimed at e-commerce transactions.

*a) Alternative methods of settling disputes: fashionable trend or real benefit?*

“Europe keen to promote consumer confidence and thereby develop electronic commerce, emphasises the need for consumers to be able to settle their disputes effectively and adequately by means of out-of-court or other similar procedures.”<sup>73</sup>

Europe has been concerned with the establishment of alternative methods of resolving disputes in consumer matters for about ten years. That concern was highlighted notably by the following documents:

the Green Paper on consumer access to justice and the settlement of consumer disputes in the single market (1993);

<sup>69</sup> In particular, the conclusions of the Tampere European Council of 15 and 16 October 1999 emphasised the need for judicial co-operation in civil matters, based on Section IV, so as to create an area of “freedom, safety and justice” SI (1999)800.

<sup>70</sup> See in that regard the proceedings of the Hague convention on international jurisdiction and foreign judgements in civil and commercial matters which expressly mention the importance of e-commerce (see in that respect, preliminary document n° 12 “Electronic Commerce and International Jurisdiction”, Ottawa, 28 Feb.-1<sup>er</sup> March 2000) (proceedings and documents available at the address <http://www.hech.net/e/workprog/jdgm.html>).

<sup>71</sup> This regulation (published in the O.J. of 16 January 2001) follows on in particular from a European Parliament resolution (European Parliament legislative resolution on the proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (COM(1999) 348-C5-0169/1999 – 1999/0154(CNS)). Parliament having been consulted on the regulation had proposed some amendments which were not accepted. See also in the same time at the international level the Draft Hague Convention on jurisdiction and foreign judgements in civil and commercial matters which intends to provide a uniform framework for determining the competent court to settle disputes stemming notably from electronic commerce transactions between companies and customers located in different countries.

<sup>72</sup> Jan. 14, 2003.

<sup>73</sup> \*\*

European Parliament resolution on the Commission's communication "action plan on consumer access to justice and dispute resolution (1996);

the Communication from the Commission concerning the principles applicable to bodies responsible for the out-of-court resolution of consumer disputes (1998);

- Commission recommendation on the principles applicable to the bodies responsible for the out-of-court resolution of consumer disputes (1998).

In order to encourage the development of e-commerce and make it effective whilst ensuring a high level of consumer protection, the directive known as e-commerce is designed to guarantee the best means of redress by the on-line use of out-of-court systems for settling disputes.<sup>74</sup> On this view, its Article 17 § 1 obliges Member States to abolish or amend any obstacles to that use in their legislation.<sup>75</sup>

Apart from this first requirement which imposes on Member States an obligation to achieve a certain result, relating to all the A.D.R., the rest of Article 17 imposes an obligation to use best endeavours and for Member States to encourage the bodies responsible for the out-of-court settlement of consumer disputes to apply the principles of independence, transparency, the participation of both parties, effectiveness of the procedure, legality of the decision, freedom of the parties and representation, in complying with Community law. These principles are the ones mentioned in Commission Recommendation 98/257/EC of 30 March 1998 concerning the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes.

The Commission's non-obligatory recommendation of 4 April 2001 supplements this first recommendation. It specifies the principle of independence of the body and that of transparency of the procedure. It dwells on the effectiveness of the procedure, which, at a reduced cost, must provide a rapid, genuine solution to the difficulties encountered by consumers.<sup>76</sup> Finally, it dwells on the need to inform consumers of the possibilities of redress before the judicial courts and their right to terminate the out-of-court procedure at any time.

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<sup>74</sup> Alternative Dispute Resolution Mechanisms according to the English expression. So far as concerns bodies that operate in a totally electronic manner (receipt of complaints, instructions in the case, issuing the sentence) we then speak of O.D.R. (On line Dispute Resolution Mechanisms).

<sup>75</sup> *De Locht, P.*, in "Les modes de règlement extrajudiciaire des disputes", in *Le Commerce électronique européen sur les rails?*, *Antoine, M.*, and alii, under the direction of E. Montero, Cahier du CRID n° 19, 2001, p. 327 et seq. Article 17 of the e-commerce directive states: "Member States must ensure that where there is a disagreement between an information society service provider and the recipient of the service, their legislation does not hinder the use of out-of-court mechanisms for settling disputes that are available under the national law, including by appropriate electronic means."

<sup>76</sup> In that respect, the recommendations of the e-confidence Forum (<http://www.confidence.jrc.it/default/htm>) created on 30 March 2000 by the European Commission. In that respect, the web site of the SANCO DG, Out-of-court bodies responsible for drafting consumer disputes, [http://europa.eu.int/comm/policy/developments/aacec\\_just/aacec\\_just04\\_fr.html](http://europa.eu.int/comm/policy/developments/aacec_just/aacec_just04_fr.html).

Finally, it will be noted that the Commission's idea is to create a network of out-of-court settlement bodies in order to make it easier for consumers to make cross-border claims.<sup>77</sup>

Moreover, those initiatives, which sit alongside all those traditionally, classed as self-regulation are the subject of experiments financed by the European authorities<sup>78</sup> and have received the often enthusiastic support of various fora.<sup>79</sup> The Telecommunications Universal service Directive<sup>80</sup> requires Member States to ensure the availability of ADR procedure. More recently the E.U. Commission has issued a Green Paper on ADR,<sup>81</sup> which raises fundamental questions as regards the future of the ADR. Notably the Green Paper underlines the fundamentally ancillary character of this procedure, which might not jeopardize the fundamental right of access to the Court, the emphasis on a real consent of both parties to go before an ADR and the necessity to develop the enforcement of the decisions taken by these ADR bodies.

#### *b) Administrative cooperation*

A number of European provisions call for better coordination of the actions taken by the national authorities (exchange of information, passing on complaints, ...). In a way, these national authorities play the role of a single counter for their citizens when they have some wrangles with operators or providers of services that are situated in another country in the European Union. Beyond that, this cooperation between national authorities will hopefully lead to a more uniform application of national legislation under a Community directive and will reinforce the harmonisation of legal systems. In addition, the coordination will take place under the aegis of the Commission, which highlights its role, and the development of a specifically European policy in the various fields concerned.

The directive known as "E-commerce" is a fine example of that European policy. Article 24 prescribes cooperation between Member States (with the help of the Commission) by es-

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<sup>77</sup> On 5 May 2000, the European Commissioner David Byrne announced the launch of such a network: EEJ Net which since 1st February 2001 has been supplemented by a FIN-NET network, specialising in financial services.

<sup>78</sup> Accordingly, ECODIR, a project launched in 2000 and run by a consortium made up of universities: CNRS (National Centre for Scientific Research), CRID-CITA (Interfaculty Committee for Technology Assessment), Univ. de Namur, Univ. of Munster and Dublin, and an ODR operator (e-resolution).

<sup>79</sup> Accordingly research by the:

- Transatlantic Consumer Dialogue (T.A.C.D.): Alternative Dispute Resolution in the context of the Electronic Commerce, February 2000, <http://www.tacd.org/papers/ecommerce/Ecom-12-00.rtf>.
- Consumer International: Consumer International, "Disputes in Cyberspace Online Dispute Resolution of Consumers in cross-border disputes – an international survey", <http://www.consumersinternational.org/campaigns/electronic/electronic/sumadr-final.html>, p. 3.
- of the GBDE (Global Business Dialog): Alternative Dispute Resolution and e-Confidence, Recommendations, 24 August 2000.

<sup>80</sup> U.S. Directive 2002/22/EC.

<sup>81</sup> April 19, 2002. A European resolution has been adopted on the Green paper on March 12, 2003 which emphasises the need not to hamper the development of ADR, the consumer's expectation towards common quality standards and procedural guarantees through the promotion of best practices and other self-regulatory measures and supports a better public awareness through information campaigns.

tablishing points of contact for the authorities where the recipients and providers of information society services can get information about their contractual rights, the mechanisms for claims and the authorities to contact if necessary.

The same initiative for combating fraud and counterfeiting of non-cash methods of payment: the outline decision of 28 May 2001 prescribes cooperation between authorities and national points of contact so as to combat fraudsters or counterfeiters more effectively.<sup>82</sup>

The “electronic signature” directive provides for the creation of an “Electronic signature” Committee made up of representatives from the various Member States, which will help the Commission to define the standards and criteria for conformity to be applied in such cases. Similarly, the “Copyright in the information society” directive establishes a contact committee between representatives of the national authorities.<sup>83</sup>

I should also mention the recent communication of 6 June 2001 concerning the “Security of information and networks – Proposal for a European policy approach” which would like to set up a European information and warning system based on national intermediaries.

Finally, effectively combating illegal and illicit messages calls for the creation of a European network of national hot lines with an exchange of information and “best practices”. Finally, effectively combating illegal and illicit messages calls for the creation of a European network promote the coordination of national measures.

### III. Conclusions

As an epigraph to these reflections, we shall ask ourselves: is there a European policy for Internet law?

It cannot be denied that every day Europe asserts its presence in Internet legislation. Europe is increasing the number of directives, recommendations, White Papers, communications, etc.

How can this phenomenon be explained? In one word, which we have already said: confidence. It is clear that the difficulties that are increasingly felt by the e-commerce sector, for example, can be explained by the lack of confidence of Internet users both with regard to security of the network and transactions that take place there and, where there are disputes, the opportunity to be able to clearly identify the relevant legal framework in order to provide a solution and enforce the decisions made.<sup>84</sup>

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<sup>82</sup> Same type of initiatives proposed by the Commission on 30 November 2000 following its Green Paper. Combating counterfeiting and piracy in the single market (15 October 1998, COM(98)569 final) and a draft directive concerning specifically a general framework for cooperation between authorities on such matters (expected for the beginning of 2002).

<sup>83</sup> This contact committee is presided over by the Commission. Its aim is to encourage the exchange of information, to analyse the impact of the directive and to organise consultations on any relevant issue.

<sup>84</sup> See the particularly instructive opinion of the European Parliament’s Economic and Social Committee on “Effects of e-commerce on the single market (OMU)” of 2 March 2000, O.J. of 25 April 2001, C 123/1.

It is obvious that in that respect, the law has a reassuring function. It creates a clear, relevant framework, subjects those involved to requirements, which will guarantee fairness and the successful outcome of the transactions. Furthermore, it lends the weight of public force to claims from those who venture on to the net. No doubt its territorial limits are being questioned in the era of the global nature of the network of networks, but the construction of regional legal areas such as the European Union and the ever growing number of discussions within official supra national organisations such as the OECD, WIPO the OMC, the Council of Europe, etc. allow an appropriate legislative consensus to be gradually established.<sup>85</sup>

That said it is perhaps useful to consider the areas where the legislator might act and examine the aims of those areas. It is said that it is a question of creating confidence, but in what and for whom? We shall limit our analysis to a comparison of European and American actions.

The first area of legislative action is undeniably that of intellectual property and related rights. As already noted in the Bangemann report, it is a question of protecting the investments granted by those who tomorrow will become the suppliers of information society services. That political will to protect the investment takes the form of laws which very often prescribe taking into consideration balances enshrined at the heart of traditional copyright legislation.

Protecting investors ensures that there is content on the Internet. Transactions then have to be expanded whether they are between professionals (B to B) or consumers (B to C). In order to do this, there must be reassurance as to the identity of the partners, messages must be authenticated and their confidentiality assured. Legislation on electronic signatures on both sides of the Atlantic affording them the value of handwritten signatures and electronic documents the value of written ones, satisfies this first concern. The failure of B-to-C e-commerce led Europe to respond to the Internet user's concerns with legislative measures. The directive on e-commerce adopted in June 2000 had two aims: firstly, to promote e-commerce by obliging Member States to revamp their arsenals of legislation by withdrawing any provision laid down by law which could deprive electronic transactions of validity or effectiveness, and by imposing new obligations for transparency on service providers and breaking the transaction down into various stages so as to ensure the full, informed consent of the Internet user.

Protecting the investment and Internet transactions also calls for the ability to detect unlawful activities on the Internet and to effectively punish the perpetrators. Highlighting paedophile offences on the Internet and other misconduct that offends human dignity, such as xenophobic or racist messages, rapidly led the national legislator, with the support of public opinion, to give a broad definition of computer crime (in some countries the mere fact of accessing a site, even without any fraudulent intent, is punishable), to significantly broaden the police authorities' grounds for investigation by giving them the right to search using the networks, by obliging private service providers (for example, access providers) to store the data

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On the activities of these various authorities, read *Trudel* (ed.), *Le droit du cyberspace*, 1995.

concerning the use of their services and to cooperate with those authorities, and finally, by promoting international police cooperation. Under pressure from America, in November 2001 the Council of Europe adopted an international convention on cybercrime, which reflected all those tendencies and allowed efficient cybersurveillance of everyone's activities on the net.<sup>86</sup> In this field, the principles of freedom of expression and protection of private life might be all too soon forgotten, principles for which, in its founding convention the same Council of Europe had sought almost absolute protection and this to the great displeasure of the European authorities.

Indeed, it was in relation to this latter subject, the protection of freedoms, that legislative intervention must be analysed. Freedom of expression is certainly one of the fundamental dogmas of the Internet. Some people would even say that self-regulation would be a compromise in order to maintain the Internet's spirit of freedom. The issue of abuse of that freedom (unlawful or harmful messages) has been considered, apart from the question of penal sanctions against the perpetrators, via a system of exoneration of liability of intermediaries as regards the supervision of the information to which they provide access.<sup>87</sup>

The issue of protection of personal data seems to be the one that most deeply divides the United States and Europe. Even if it must be conceded that the sensitivity of American Internet users is much greater than that of their European counterparts, the United States refuses to take any action in this regard, whereas Europe has every intention of adapting its legislative requirements as far as possible to meet the challenges posed by new technologies.

Balanced between these various interests to be protected, does Europe speak with one voice? The distribution of powers and budgets between the European Commission's many "Directorate Generals" explains why the intentions are not always convergent, some give more weight to the trade lobbies or, conversely, to consumers, others invariably extol the virtues of the single market by setting out or not, as appropriate, the need for an original European policy in relation to those of other regional blocks.

Through the impressive mass of European provisions, the desire to construct a common legal, judicial, indeed, jurisdictional and administrative platform shines through. No doubt, subsidiarity gets nothing out of it but rather the "requirements" of e-commerce. Europe and, especially the Commission within it, appear to be a place of preventative control of national measures. It coordinates the work of administrations and establishes more effective methods of judicial and jurisdictional remedies, at the same seeking to make it easier to enforce judgements. The Commission's audacity on these points seems genuine: establishing a European contract law, desire to create an original European system of mediation and/or

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<sup>86</sup> The text is available on the Council of Europe's web site (<http://conventions.coe.int/Treaty/FR/cadreprojets.htm>). On this problem of computer crime, read *Martin*, *La criminalité informatique*, 1997.

<sup>87</sup> These are the famous Articles 14 and 15 of the European directive on certain legal aspects of e-commerce and their American counterparts found in the aforementioned Digital Millennium Copyright Act of 18 Nov. 1998 (on these provisions, read *Montero*, *La responsabilité des prestataires intermédiaires de l'Internet*, *Ubiquité* June 2000, n° 5, p. 114).

conciliation. On these various points, e-commerce and the desire to promote it would seem to legitimise these innovative measures which go far beyond this single field of economic activities.

The construction of a European legislative area is certainly taking place through – sometimes tough – dialogue with the other partners in this increasingly global everyday commerce.

Indeed the search for common principles or solutions within the national or international organisations, and consequently in particular in the protection of consumers or minors so far as concerns signatures encourages standardisation of the conduct of the parties involved, not to say cooperation (if only police cooperation) between countries. Accordingly, Europe seeks to have a presence within those organisations, including private ones such as ICANN. That involvement shows an awareness of not only the technical (far from it!) issues involved in the decisions concerning the choice of technical standards or norms.

If a consensus cannot be reached, the European Union, in the name of its sovereignty, points out the choice of values reflected in its legislation. This reminder and the harmful consequences that it may have on e-commerce are the starting point for international negotiations with other countries. No doubt through means that are more in line with their own legal tradition, those countries will find adequate protection in relation to the principles set out by the European Union. The discussions concerning “Safe Harbour Principles” bear this out.

The European authorities seek to tie this normative dialogue not only to the exterior in international bodies but also internally with the private players. A number of principles are driving the European legislator in this dialogue. Firstly, it is a question of recognising the value of these so-called self-governance rules, better to encourage them in order to draw inspiration from their content to define new rules of law.

This movement for confidence is not total. Secondly, it is a question of remembering that the private creation operates within a legislative framework that the European authorities lay down themselves, going as far as defining the conditions of such a creation. Accordingly, from the point of view of their content, private measures must provide added value to the national legislation. From the point of view of their creation and implementation, the mechanisms for perfecting these techniques for regulation and the application of the content of those private rules must be transparent and take into account the interests of the various players.

Come on: European Internet law does indeed exist. It has a purpose: to create confidence.