



13th Annual BILETA Conference: '*The Changing Jurisdiction*'

Friday, March 27th & Saturday, March 28th, 1998.
Trinity College, Dublin.

Can Europe Regulate the Internet and Electronic Commerce?

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The Internet and electronic commerce carried out on the Internet may change the world, the European Commission suggests that "...electronic commerce revenues on the Internet may increase to 200 billion ECU world wide by the year 2000". [2] It notes that the US already boasts more than 250,000 "cyber-companies" using the Internet and that travel services and flower distribution services are a major success. [3] The manager of Microsoft's Interactive-Services division, has suggested that in 30 years time 30% of all consumer sales will be on the Internet [4] and the President of the USA thinks that "...commerce on the Internet will total tens of billions of dollars by the turn of the century and could expand rapidly after that...". [5]

In view of all this potential, the Commission naturally wants to create a regulatory framework which would favour the development of Electronic Commerce in Europe. In its April 1997 communication *A European Initiative in Electronic Commerce* [6] it takes the view that "the pace and the extent to which Europe will benefit from electronic commerce greatly depends on having up-to-date legislation that fully meets the needs of business and consumers". The Commission intends to implement an "appropriate regulatory framework by the year 2000". This framework will have two complimentary objectives: firstly, to build trust and confidence and secondly to ensure full access to the single market.

The Commission proposes four principles which will provide the EU with an "...adaptable and appropriate framework of legislation." [7]

- No Regulation for Regulation's sake:
- Any Regulation must be based on all Single Market freedoms:
- Any Regulation must take account of business realities:
- Any Regulation must meet general interest objectives effectively and efficiently.

The Commission anticipates that this regulatory response will have to deal with different legal issues at each step of business activity so that electronic commerce can flow freely across national frontiers. So regulation will apply "from the establishment of the business, to the promotion and provision of electronic commerce activities through negotiation and conclusion of contracts to the making and receipt of electronic payments". [8] At the same time this regulatory approach will have to develop appropriate "horizontal" policies on issues such as data security and protection, appropriate protection for intellectual property rights and conditional access services and ensuring a clear and neutral tax environment".

However the ability of the commission to develop its own regulatory policy for the Internet must be doubted as the Internet is of course a global network and the Europe cannot simply cut itself off from the rest of the world. This point is illustrated by an examination of proposed tax policy on the Internet. As the revenues from electronic commerce increase, governments will be tempted to tax these revenues and as the Commission states: "the potential speed, untraceability and anonymity of electronic transactions may also create new possibilities for tax avoidance and evasion.

These need to be addressed in order to safeguard the revenue interests of governments and to prevent market distortions". [9] In its Communication on Electronic Commerce the Commission clearly anticipated that electronic transactions would be the subject of taxation, the Commission stated that it was vital that tax

systems would provide legal certainty [10] and tax neutrality [11] and noted that VAT was the one area in which Community rules were most harmonised. [12] The commission noted that some commentators had suggested alternative ways of raising revenue such as a 'bit tax' [13] but they felt that these were not appropriate since VAT already applied to such transactions.

The Americans had more radical ideas, in July 1997 American President Bill Clinton suggested that the Internet should be a global free trade zone and he expressed the hope that by working through the World Trade Organisation this can be achieved by July 1998. [14] This did not appear to be compatible with European ambitions to preserve taxation revenues on-line, but in December 1997 the EU and the US issued a joint statement on electronic commerce. The parties specifically agreed to work towards inter alia:

"A global understanding, as soon as possible, that (i) when goods are ordered electronically and delivered physically, there will be no additional import duties applied in relation to the use of electronic means; (ii) in all other cases relating to electronic commerce, the absence of duties should remain ". [15]

If implemented this policy will have a radical effect on how software is sold, software sales through shops where they are subject to VAT will cease and tax-free sales (and transmission) of software will become the norm. This is what the USA wanted, but it may not be to the immediate advantage of European countries such as Ireland who have large numbers employed in the sale, packaging and distribution of software.

This illustrates the fact that Europe cannot regulate electronic commerce unilaterally. The Commission itself acknowledges: "...new national legislation in diverse areas (for example encryption, digital signatures, data protection and privacy, contract law, new electronic means of payments) can create trade barriers which will hamper the development of electronic commerce at a global level." The Commission suggests that "...the community should further work through appropriate international for and bilaterally with its major trading partners to establish a coherent global regulatory framework ". [16] The Commission has also suggested the adoption of an international charter for electronic commerce which would be: a multi-lateral understanding on a method of co-ordination to remove obstacles for the global electronic marketplace; be legally non-binding; recognise the work of existing international organisations; promote the participation of private sector and relevant social groups; and contribute to more regulatory transparency. [17]

New Regulatory Bodies

The Internet undoubtedly needs some sort of regulation, it is frequently compared to the wild west [18] and talked of as a "frontier". Although this point may be accepted, there is no agreement on what form this regulation should take. This question was addressed by the EU in its *Green Paper on the Convergence of the Telecommunications, media and information technology sectors and the implications for Regulation, towards and information society approach* [19] published in December 1997. The Commission anticipates that sectors such as the Internet, cable and satellite television and telecommunications will converge to form one new sector and also anticipates that devices such as telephones, computers and televisions will start to adopt one another's characteristics. The Commission has suggested the following principles for future regulatory policy:

- Regulation should be limited to what is strictly necessary to achieve clearly identified objectives.
- Future Regulatory approaches should respond to the needs of users.
- Regulatory decisions should be guided by a need for a clear and predictable framework.
- Ensuring full participation in a converged environment.
- Independent and effective regulators will be central to a converging environment.

The Green Paper also sets out three options for regulatory development. The first option is to build on current structures, current regulators such as those for television or telecommunications would be left in place, but it would be extended on a *ad hoc* basis principally at national level. The commission suggests that this approach would minimise the need for change in the near future and could be effective in providing a predictable regulatory framework for investment, however it might leave certain anomalies in place which could deter investment. The second option is to develop a separate regulatory model for new activities, which would co-exist with telecommunications and broadcasting regulation. New services and activities such as the World Wide Web would be "carved out" and placed under a distinct set of rules. The result of this would be to move away from technology based or platform-based market boundaries for a wide-range of services, whilst allowing the framework for traditional core telecommunications and broadcasting activities to be adapted more gradually. The Commission suggests that the principle difficulty with such an approach is determining the

boundaries of what may be part of a lightly regulated, new service world and what remains subject to traditional regulation. It suggests that some services might be identified negatively as neither telecommunications or broadcasting. However they suggest that experience has found that such an approach encounters practical difficulties.

Finally the Commission suggests that a new regulatory model could be progressively introduced to cover the whole range of existing and new services. This far reaching option would require a fundamental reassessment and reform of today's regulatory environment. The Commission suggests that this option would require a broader definition of communication services to supersede those of telecommunications and audio-visual services within Community legislation. Proportionality would be a necessary feature of the new environment given that within such a broad definition, the level of regulation would have to be matched to the nature of the service and the intensity of competition. The Commission acknowledges that such an option might be considered to be too ambitious but it suggests that it would not necessarily lead to sudden disruptive change. The approach could be gradual, focusing initially on priority areas which require a consistent regulatory approach (such as network operation or issues relating to access). There would also have to be sufficient time for a change-over from the old to the new regime. [20]

However it is hard to believe that the Commission could simply create such a regulatory body without at least consulting with the USA. The fate of the proposed system for generic domain names which was to have been regulated by WIPO is a case in point. As the Internet expands it is running out of addresses and this is giving rise to an expanding body of caselaw. Cases where an individual or company hoard or stockpile Internet addresses whether to sell them [21] or to abuse them [22] have now become both numerous and notorious. However cases such as these are relatively easily solved by the law of trademarks or passing off. A more complex situation arises where two companies or individuals can legitimately claim the same domain name [23] the, this will lead to greater problems in the future, to take one example there are numerous companies which could legitimately claim the address sun.com. [24]

To try to avoid this problem an attempt was made to set up new generic domain names, the system designed was a good one, it would have created seven new generic domains: *.firm* for businesses or firms; *.store* for businesses offering goods for purchase; *.web* for entities emphasising activities relating to the World Wide Web; *.arts* for entities emphasising cultural and entertainment activities; *.info* for entities providing information services; *.nom* for those wishing to have a personal or individual name. The system would have been administered by up to 28 registrars around the world and conflict resolution procedures for the system will be administered by the WIPO Arbitration and Mediation Centre. [25] However it swiftly ran into political controversy, as it was rejected by the USA which wants government to relax what little control it has of the Internet and be replaced by Private Companies (which will inevitably be American). As one (anonymous) American politician is quoted: "American taxpayers, companies and the government built the Internet, why should we concede governance to a global body? ". [26] Instead the Americans have come up with a broadly similar system of registration involving the creation of five domain names instead. Although the controversy on this issue may take months or even years to resolve, non-Americans are increasingly prominent on the Internet and "The days when America can reasonably claim the Internet as its fief are running out ". [27]

More generally, European legislation on Intellectual Property rights in particular those which relate to Information Technology have appeared to be devised to comply with international pressures rather than to respond to indigenous concerns. The Semiconductor Chip Directive of 1988 [28] was created to ensure compliance with the USA's Semiconductor Chip Act. [29] The more recent *Draft Directive on the Harmonisation of certain aspects of copyright and related rights in the information society* [30] is also made subject to the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty". [31] This might raise questions about the appropriateness of Europe's legislation for Information Technology and the fact that it often appears to be inspired by the concerns of American as opposed to European business. But it illustrates the reality that Europe cannot regard itself as an Island when legislating for the Internet or other aspects of information technology, any legislation will have international repercussions even if legislation is clearly limited on its face, to Member States of the EU.

The international nature of the Internet is acknowledged by the Commission in its Communication on *The Need for Strengthened International Co-ordination* [32] which suggests that "...specific character of the borderless electronic marketplace and the transmissions which circulate within it... require clarification or adaptation of existing legal frameworks and enforcement mechanisms ". [33] This Communication suggests that reform may be necessary in the following areas: VAT; Jurisdiction; labour law; copyright; data protection; trade marks; authentication; consumer protection; terms and conditions of contract; and harmful and illegal content.

Conclusion

Europe does not need new regulatory structures for the Internet, what it needs is companies producing software, content and technology for that market and capable of competing with the USA while doing so. It may be argued that until Europe produces such an industry it should desist from legislating for the Internet, the difficulties which may be encountered when legislating for the Internet in Europe are described by the Commission:

“If Europe can embrace these changes by creating an environment which supports rather than holds back the process of change we will have a powerful motor for job creation and growth, increasing consumer choice and promoting cultural diversity. If Europe fails to do so, or fails to do so rapidly enough, there are real risks that our businesses and citizens will be left to travel in the slow lane of an information revolution which is being embraced by businesses, users and by Governments around the World”. [34]

The form of a new regulatory body for the Internet and other ‘convergent’ sectors is vitally important. If such a body is to be introduced then it is vital that there should be proper oversight of the operation of the body. I would suggest that if a central body is to be set up then it must be democratically elected, otherwise it will become the creature of industrial and national interests. [35] The Internet is what Americans might call an “empowering” technology, it allows people to express their views freely and to congregate in groups without interference. The Internet will allow Europeans to be mobilised into interest groups and lobbies with ease, and it will become possible to hold democratic elections on-line. There is a danger that a central regulatory body will become a central planning agency more appropriate for the defunct Soviet Union than a modern technology. Allowing such a body to be democratically elected would ensure that it remained responsive to the needs of users and the European public.

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Notes

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(2). Communication from the Commission, A European Initiative in Electronic Commerce, Brussels 16.04.1997, Com (97) 157 final, p4, citing Activmedia, Romtec, in European Information Technology Observatory 97.

(3). *ibid* p5.

(4). Quoted in the Economist, Electronic Commerce Survey, p25, May 10th 1997

(5). Memorandum of Bill Clinton, President of the USA on Electronic Commerce addressed to Heads of Executive Departments and Agencies, 1 July 1997. See <http://www.whitehouse.gov>.

(6). Brussels, 16.04.1997, COM (97) 157 final.

(7). *ibid* p14.

(8). *ibid* p15-17.

(9). *ibid* p19.

(10). so that tax obligations would be clear, transparent and predictable. *ibid* p19.

(11). so that there is no extra burden on these new activities as compared to more traditional commerce. *ibid* p19.

(12). *ibid* p19.

(13). See the "Interim Report of the High Level Group of Experts on the Social Aspects of the Information Society" <http://www.ispo.cec.be/hleg/hleg.html>.

(14). Remarks by the President of the USA in announcement of Electronic Commerce initiative, White House Press Secretary, 1 July 1997. See <http://www.whitehouse.gov>.

(15). 5 December 1997, <http://www.qlinks.net/comdocs/eu-us.htm>.

(16). *ibid* p20.

(17). Communication from the Commission...on the need for strengthened international co-ordination, COM (98) 50, p11-12.

(18). For example, *The Times*, 12 February 1998.

(19). Com (97) 623, 3 December 1997.

(20). *ibid* p47.

(21). For example: *Harrods -v- Lawrie & others*, Unreported, See Gardner, *The Harrods Case: Protecting your name on the Internet. Computers and Law*, April/May 1997, p24.

(22). For example: *Planned Parenthood -v- Richard Bucci* (Trading as Catholic Radio) (1997 US Dist LEXIS 3338, 1997 WL 133313).

(23). For example: *Gateway 2000 -v- Gateway.com Inc & Alan Clegg* (1997 US Dist. LEXIS 2144)

(24). It actually belongs to the computer company, see generally: *Kelleher Domain Names*, *The Bar Review*, November 1997.

(25). WIPO, consultative meeting on Trademarks and Internet domain names, Geneva May 26th to 30th, 1997, *Issues Relating to Trademarks and Internet Domain Names, Memorandum prepared by the International Bureau*.

(26). Reeve, "Who is in the driving seat on the information superhighway?.", *The European*, 9-15 February 1998. See also *The Irish Times*, 6th February 1998.

(27). *The Economist*, February 7th, 1998.

(28). Council Directive 87/54 of 16 December 1986.

(29). See Kelleher & Murray, *Information Technology Law in Ireland*, Butterworths, 1997, p128.

(30). Brussels, 10th December 1997.

(31). *ibid*, Recital 10.

(32). European Commission, DG XIII, Com (98) 50.

(33). *ibid* p6.

(34). European Commission, *Green Paper on the Convergence of the Telecommunications, media and information technology sectors, and the Implications for regulation towards an information Society Approach.*,

Brussels, 3 December 1997, COM (97) 623, p2. The Commission liked this section so much they repeat it on p48.

(35). Using the Internet to monitor the decision making of the EU has been suggested elsewhere: Weiler, The European Union belongs to its citizens: Three Immodest Proposals, 1997 22 E.L. Rev. Apr. p150.

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