



Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

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E-GOVERNANCE - THE CO-OPERATIVE APPROACH

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Ladies and Gentlemen,

I am very much honoured and pleased to address such a distinguished audience of e-business stakeholders. What is needed today is a large helping of realism, conviction and vision, as well as trust and friendship to face the challenges of the internet economy. This will enable us to bear the tremendous pain of change and to understand the sea changes ahead of us that will be brought about by internet governance. The pain will be too great for many. Instead, winners will embrace change, they will enter uncharted waters and try new avenues.

I will address these issues as a consumer – just as we are all consumers – but I will do this from a strong industrial background. At this stage of public debate you will appreciate that I prefer not to give you a formal statement but just to express my personal views. We should once more get used to private opinions. Presidency actions may follow at a later stage.

Co-operative self-regulatory solutions for e-governance have been favoured worldwide not only by industry and trade but by other major e-business stakeholders as well, including consumers. Companies agree with consumers that in the digital economy national courts are not very relevant to consumers in most practical cases. And, to make one thing clear right from the beginning: self-regulation is not unilateral, it includes all stakeholders, it in fact means co-regulation between companies and consumers alike without undue interference by government and other public regulatory agencies.

As shown by the recent OECD conference “Convergence of stakeholders’ interests in e-commerce” last October, e-commerce development is moving towards convergence of interests in a still broad centre area and towards recognition that the e-economy will bring genuine benefits to consumers. At this OECD convergence conference industry and trade presented through the “Alliance on Global Business” (AGB) an “Action Plan by Business for e-commerce”, including an annex with some 70 examples of self-regulatory e-commerce measures.

These solutions are not perfect yet. Companies and consumers will know this very well. Today however, there is among e-business stakeholders at least in principle agreement on the need to improve these existing trust schemes continuously to supplement public standards and regulations perceived by many as inflexible and ineffective. That is the key.

Despite the persistence of political cultures which believe in the predominance of government regulation alone, we observe growing consensus among e-stakeholders to build on their own for the development of “e-resolutions”. This process, largely in association with consumer organisations, needs further improvement and should thus be strengthened, not weakened through premature legislation. Therefore, more structured dialogue is needed to deepen understanding and to develop a culture of co-operative e-governance. That is the European approach.

First, let me share some ideas with you on the **regulatory concerns** of companies,

Second, to explain essentials of **co-operative e-governance** in a globalised world,

Finally, to conclude with some proposals for a **Framework on self-regulation**.

Industry and trade, not only in Europe but worldwide, very much agree that trust and consumer protection are the basis also of electronic commerce. Ensuring consumer confidence through the whole value chain of electronic services is a prerequisite for building a successful e-business environment. Trust and confidence-building measures have a key role to play in sustaining demand-led electronic transactions. This is basic.

Restricting consumer choice through counterproductive barriers to protect consumers would not create the confidence users and providers deserve to make e-commerce a success. Nor would it ensure the protection consumers merit because protective barriers, like viewing masks or other technical remedies, can all too easily be bypassed in a global network. What is urgently needed are new avenues to address the issues constructively and to strive for a win-win solution for all stakeholders alike. Solidarity and co-operation have always been essential parts of an authentic European approach.

1. Regulatory concerns

Companies are extremely concerned about endeavours to bring about a substantial extension of court jurisdiction at the place of the consumer's domicile.

Article 15 c of the 14 July 1999 draft Brussels Regulation (which mirrors article 13 of the 1968 Brussels Convention), applies to a contract that "... has been concluded with a person who pursues commercial or professional activities in the state of consumer's habitual residence or, by any means, directs such activities to that state ...".

In reaction to proposed amendments to the Brussels Convention, industry and trade stated the following:

- Article 15 c of the draft Regulation would expose any supplier operating a website (including public authorities) to jurisdictional risks at the place of the consumer's domicile. The mere operation of a website could be judged an operation directed at consumers in any country. In contrast with the 1968 Brussels Convention, the draft Regulation is no longer limited in scope to transmissions actively aimed at consumers (such as a specific directed offer or advertising). The draft Regulation applies to every website accessible by a consumer in or from the consumer's country.
- Thus, there would be a virtually unlimited extension of jurisdiction in consumer matters. This would prove to be an obstacle to investment, especially for small and medium-sized enterprises wishing to enter the digital economy. Such enterprises would assess the risks involved in this expansion of jurisdiction as being unacceptable. Therefore, they would decline to provide services or to offer products on the internet. As a consequence, the proposed Brussels Regulation would limit consumer choice since fewer SMEs would enter the digital economy.

E-business stakeholders are very well advised not to underestimate these negative ramifications of the proposed Regulation for the development of electronic commerce in Europe and its damaging effects on economic growth and employment.

- It is to be feared that the proposed extension of jurisdiction in the Brussels Regulation will have direct effects on the pending revision of the Rome I Convention (on

applicable law to contractual obligations). It can indeed be expected that the revised Rome I Convention (and the intended Rome II Regulation on applicable law to non-contractual obligations) will apply the law of the consumer's country of domicile when a supplier provides internet transmissions accessible in the consumer's country of residence. This would further add to the negative consequences of the Brussels Regulation.

- The solution in the proposed Brussels Regulation is inconsistent with internal market principles in the field of e-commerce (as expressed for example in the draft EC directives on electronic commerce and digital signatures). In addition to the legal risks of the draft Brussels Regulation there is the immediate link with the question of applicable law even if expected effects on the Rome Conventions, as already explained, do not materialise. Experience shows that competent courts are inclined to apply the law of their own country, beyond what is mandatory.
- Policy-makers, therefore, should refrain from amending regulations that have proven their worth over the years. Instead, policy should focus on providing low-cost and effective cross-border redress such as arbitration and mediation in co-operation with consumers and other e-commerce stakeholders. Although e-commerce does present new challenges, because changes are more rapid and more profound than ever, the requisite redress mechanisms should build on previous experience. Self-regulation by stakeholders is nothing new in Europe. In fact, it is as old as trade itself.

Companies have made substantial progress in improving the quality and reliability of their websites. In association with consumer organisations, companies could do even better, as recent studies have shown, to enhance co-regulation measures by way of trans-national web trust schemes, best business practices and effective codes of conduct. This process of co-operative e-governance should be strengthened, not weakened through counterproductive legislation.

In conclusion, industry and trade, with the growing consent of the European Parliament and the Economic and Social Council, urge:

1. to reinstate into the proposed Brussels Regulation the original wording of the 1968 Brussels Convention with a recital stating that websites which do not actively solicit foreign consumers do not fall within the scope of the Regulation (article 13, new article 15),
2. to determine - if possible at all - an objective characterisation of a website as actively targeting a foreign consumer in a global economy, compared with so-called passive websites, and accordingly
3. to postpone any decision on the Brussels and Rome Conventions or to defer completely e-commerce provisions therefrom to allow time for clarification.

These difficult legal questions clearly require further reflection as well as thorough and timely consultation, including regulatory options in the context of the Hague Conference on private international law, and in particular its draft Convention on jurisdiction and the effects of judgements in civil and commercial matters.

2. Co-operative e-governance

Business has many deficiencies, we know this very well. But at least, business has taught us to think globally. E-commerce in particular is global, it is borderless. Law, for the most part, is not, it is still local or regional at best. To regulate global transactions in a decentralised network structure by exclusively national law would be an anachronism in itself, comparable only to two steps forward and one step back.

From these challenges posed by the emerging borderless information society stem notions such as cyber-governance, internet governance or e-governance. In a narrow sense, internet governance may concern the complex relations between government agencies on internet-related matters. Internet governance addresses such issues as the organisation and management of internet naming and addressing systems, now through the “Internet Corporation for Assigned Names and Numbers” (ICANN).

However, in a wider sense, internet governance regards the trans-national reallocation of competences in favour of functional economic, political or cultural entities. This functional de-linkage is what e-governance is all about.

The dramatic sea changes heralded by the internet include co-operative self-regulation by economic clusters or associations. The relationship between internet governance and the traditional regime of exclusive national sovereignty might largely be discussed in these terms of systems analysis and functional differentiation.

Governance in cyberspace and governance of e-commerce in particular focus on:

- functional sovereignty and decentralised subsidiarity, compared to hierarchical subordination,
- regulatory elements in terms of creating and correcting network access,
- safeguarding users’ interests and, in particular, strengthening consumer trust,
- flexibility through lean government by delegation of competences,
- co-operative self-regulation through functional entities and market actors.

To the extent that co-regulation by e-business stakeholders is seen as a viable solution, it is recognised that the nature of and the degree of connection between self-regulatory associations and traditional legal institutions might vary from issue to issue. In any case, e-governance can exist independently of national laws as proven by mandatory mediation or arbitration that ensures high effectiveness through own rules by the parties involved.

Thus, the core of trans-border e-governance understood as joint self-regulation or co-regulation by e-business stakeholders, providers and users alike, is co-operation. Realistically, a national or regional legal back-up in times of transition may be required. However, such back-up is exclusively required as a last resort after all means of agreed self-regulation have been exhausted.

Long-standing experience of international arbitration might serve as a reference and as a model to be built upon. And because the question has been raised many times: the degree and/or the frequency of back-up or substitute utilisation can measure the effectiveness of various co-regulation schemes.

As a result, e-commerce governance may become more networked in a global digital economy, thus transcending limited national perspectives and growing into a new functional sovereignty of associated stakeholders themselves. This is what provokes pain of change and resistance.

Understood as system analysis in this functional and no longer exclusively in the traditional hierarchical sense, subsidiarity would even justify the primacy of co-operative e-governance against disproportionate and dysfunctional government regulation.

As said before, the core element of e-governance in this system analysis perspective is the co-operation of stakeholders in an effective, autonomous and balanced scheme. An authentic European approach to e-business self-regulation has to elucidate the relevance of co-operative association.

Stakeholders have to be aware that it is not possible for one interest group or organisation to derive lasting benefits from advanced digital economies in the age of globality without the co-operation of others. E-commerce users and providers have to get together, they have to get networked through associations focusing on either individual companies, sectoral clusters or worldwide industries.

Winners in on-line Europe, as elsewhere, provide trust and confidence by networking provider-user associations around core e-businesses. Winners provide trust through associative economies.

3. Self-regulation Framework

How can business be borderless when the law is not? What has to be done to avoid falling into the trap of the jurisdictional issue, the local vs the global? Do we have answers to that query? Yes, I think we do.

To answer that question, the “Global Business Dialogue on e-commerce” (GBDe), at its Paris conference last September, proposed the setting-up of effective trust schemes. Along the same lines, UNICE (Europe’s industry and employers’ union), also last September, took the initiative to launch the following e-action programme:

- **Euro-codes** have to be developed on a company and sectoral level to move the structured industry-consumer dialogue process forward,
- **Co-operative e-governance** has to associate the various stakeholders since consumers and companies alike are involved in e-business transactions,
- To implement the above, the establishment of a **E-business Forum** was proposed with the support and active involvement of all e-stakeholders.

What has been achieved since then?

Successful joint initiatives mainly by industry, trade and consumer associations were undertaken to kick off at European level a e-commerce dialogue forum. It still is only a beginning, which needs careful guidance and support. The core element of this dialogue forum is a **European eCouncil** as a broad centre area serving as one of many European meeting places for dialogue by major e-business stakeholders.

The proposed structure allows the involvement of companies, including SMEs, trade and industry federations, consumer organisations, Commission representatives and the academic community.

The chart in the conference documentation visualises the basic elements of this voluntary dialogue forum.

The European eCouncil builds upon national experiences, in particular the “Electronic Commerce Platform Netherlands”, an independent non-profit association between stakeholders in electronic commerce with today some 200 members. This Dutch “polder example” is of model value elsewhere due to the specific trans-national character of e-commerce which requests more associative co-operation between e-commerce stakeholders, based on enhanced consensus solutions and co-operative e-governance through effective co-regulation.

Members include users, providers, government agencies, intermediary organisations, and educational establishments, including consumer representatives in specific projects. Formal membership of consumers is expected shortly.

As with the Dutch e-commerce platform, the aim of the European eCouncil dialogue forum is to build up consumer confidence through a multiplicity of associative actions and a range of co-regulatory e-commerce measures. Main eCouncil projects may include model codes for co-regulation between industry, trade and consumers. A first concrete initiative could address the requirements of a **European Framework** for effective codes and other co-regulatory measures in the digital economy and beyond.

It is desirable that such a Memorandum or Framework Directive will develop internet governance co-regulatory issues in such a way that simple, timely and inexpensive complaint handling and dispute settlement procedures exist for users and consumers, other than via national courts. The regulatory framework should ensure legal certainty for all concerned by optional enforcement measures, including mandatory mediation and arbitration.

Different constructions will be appropriate in different circumstances. Co-regulation may not be sufficient without such enforcement mechanisms to ensure required protection. Ultimately, co-regulation will only be truly effective through trust, backed-up by the possibility to give decisions legal force, as is the case in international arbitration.

Such co-regulatory measures should be drawn up by consensus and co-operation through dialogue bodies (like the eCouncil initiative or the “Economic and Social Council”) where all e-stakeholders are able to state their views. Governments should stimulate and strengthen these processes but should refrain from direct interference through the endorsement of model codes, arbitrary minimum redress requirements or trusted web-trader audit systems.

It is of paramount importance to address these issues in one single regulatory document. E-governance, except specific sectoral aspects thereof, should not to be regulated, sometimes even unnoticed by those whom it may concern, in various sectoral directives or regulations.

In particular, the proposed 99-review “Telecommunication Framework Directive” should not be burdened with these constitutional elements of e-governance regulation in Europe. E-governance has to be addressed in one single overall Framework Directive to which other directives have to refer. Otherwise the dispersion will only create confusion and not urgently needed clarity.

In addition, regulatory experiences elsewhere, for example experiences concerning industry co-regulation mechanisms under the 1997 Australian Telecommunications Act have to be scrutinised and taken into account (such as “Telecommunications Industry Ombudsman”, “Telecommunications Access Forum”, and “Australian Communications Industry Forum”).

The essential elements and objectives of a possible overall Self-regulation Framework Directive could be:

- Creating trust for e-commerce providers, users and/or consumers,
- Model building blocks for framework co-regulation,
- Procedures in which stakeholders would agree to engage, in the event of un-resolved disputes within self-governing structures,
- Primacy of co-regulation with back-up by public legal framework,
- Requirements for enforcement schemes (leaving room for different methods under discussion, including conciliation, mediation and arbitration, trust seals, monitoring, complaint boards, etc.),
- Arrangements for the designation of neutral eCouncil intermediaries, advisors, mediators and arbitrators.

This process might continue and find its way with the help of all stakeholders interested in this major initiative. With the pro-active support of dialogue members, terms of reference, qualification criteria for dialogue participation, etc., will be agreed upon. The terms of reference might give guidance for possible next steps to be taken towards associative e-commerce governance at European level.

The only pre-condition for the success of this eCouncil initiative is the agreement by participants on the need to develop new types of dispute resolution procedures, informal and extra-judicial alternative dispute resolutions (ADRs) or so-called “e-resolutions”.

Both, consumers, industry and trade have a strong interest in trying to develop voluntary systems for both prevention of disputes, by promoting higher standards and guarantees, and resolving disputes when they arise (through various systems of codes of practice, on-line tribunals, e-resolutions, e-arbitration, trusted third parties, trust schemes, etc.).

The dialogue process will concentrate on queries as to how self-regulatory schemes might be implemented and enforced. As we all know very well, in many cases co-regulation is recognised to be more cost-effective and productive than any so-called hard law has ever been: constant dripping wears away the stone.

With the right kind of legal framework in the background, there may be new ways in which industry, trade and consumer organisations working together could achieve more effective enforcement procedures by applying common principles to practical cases.

With joint efforts of similar initiatives such as the French “L@belsite”, the UK “Web trader scheme” or the Dutch “e-commerce platform” this joint eCouncil dialogue forum could strive for a Self-regulation Framework Directive setting out principles for developing and promoting various Euro-codes to be applied at company-level or otherwise.

E-stakeholders have to get away from the old paradigm that you have either law or you have codes. It has always been presented as one or the other and not something in-between. The eCouncil could work out a much needed European complementary approach.

The key is to abandon an all-or-nothing approach and jointly to develop intermediate strategies, which supplement lean government framework regulation through effective economic self-regulation.

Whatever the results will be, as long as e-business stakeholders agree on the essentials of co-regulation, agreement has to be followed by joint action and practical tests in the market place for developing effective e-resolution procedures.

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Ladies and Gentlemen,

Networking and co-operation between associated e-stakeholders on various levels and in various scopes, company/consumer-centred or other, draw attention to the wider perspective of the general move towards a service society and e-economy throughout Europe.

Networking and co-operation on internet-related governance between consumers, industry and trade will become key constitutional elements of e-governance to parallel major e-economy trends. Economic sovereignty belongs to the economic citizens, industry, trade and consumers, and only in proportionality and subsidiarity with governments. In the end, these perspectives will ensure lean policy frameworks.

As said at the beginning, the process of autonomous co-operative e-governance needs further improvement and should thus be strengthened, not weakened through premature and counterproductive e-commerce legislation. Such legislation would cut short this new process; it would prevent eEurope from taking off and flourishing. Europe would again miss the boat.

The co-operative approach through structured dialogue methods will allow winners in on-line Europe to emerge. E-Europe will be networked, it will be based on co-operation and association.

Attachment: 1 chart