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# ***Out-of-court dispute settlement systems for e-commerce***

*Report on legal issues  
Part I: The Parties to the Dispute*

29<sup>th</sup> May 2000

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## 1 Introduction

Out-of-court dispute settlement is particularly apt to address legal controversies between an Information Service provider and a recipient in cross-border relations within the Internal Market. The purpose is to avoid the subjection of the legal controversy to the jurisprudence of a national court. It is felt that, taking into account of the workload of national courts, the settlement of international disputes in electronic commerce offers the parties involved an appropriate tool, in particular, since the out-of-court dispute settlement can make use of technologies which are employed in electronic commerce.

The appropriateness of out-of-court dispute settlement for issues relating to international data interchange was already felt in 1995:<sup>1</sup> *Recent developments in automation, like EDI, have resulted in a shift in trading patterns, making the traditional legal instruments appear to be increasingly inadequate. This raises the question of whether national laws are sufficient to provide the conditions necessary for this development, especially considering the cross-border nature of EDI...* Thus it was expected a shift from an intervening (national) court adjudication to a more autonomously operating (international) business adjudication in which the rules are drafted on the basis of which conflict solving decisions will be made. Taking into account of the global nature of electronic commerce and the free access of open computer networks it is evident that a similar development will relate to the business-to-consumer sector.

International dispute settlement aims at the maintenance of the equality of the legal chances of both parties in conflicts arising from a dispute when the parties are domiciled or established in different states. Out-of-court dispute settlement means the solution of legal conflicts by resort to arbitration, mediation or conciliation. It may also include the settlement before an ombudsman or within a consumer complaint scheme. However, the international and national legal systems which provide for out-of-court dispute settlement differ, just as the legal traditions of the states concerned. Whereas arbitration as the most formal way of out-of-court dispute settlement has been regulated on the basis of international legal instruments, there are hardly any international instruments which would regulate mediation or conciliation and ombudsman proceedings or consumer complaint schemes.

Alternative dispute settlement is an effective means for the settlement of disputes. In the traditional business-to-business litigation, most cases are settled without a judgement.<sup>2</sup> Of the methods relating to out-of-court dispute settlement arbitration is the most formal one. Arbitration became an inherent element of electronic commerce.<sup>3</sup> However, in the cross-border electronic commerce arbitral awards, in order to be enforceable, have to meet the requirements of the international private law. Whereas there are hardly any rules of the international private law which regulate mediation in cross-border electronic commerce, this legal tool can only serve the parties if they want to settle the dispute on the basis of an agreement. The mediator has no power to impose a 'decision' on the parties. Different from the case of foreign arbitral awards, the enforcement of foreign agreements on mediation or arbitration is not regulated by international instruments. Even if the parties agreed to a settlement, its enforcement generally presupposes that a party institutes legal proceedings before a national court asserting that the conclusion of the settlement constituted a contract. In the sector of consumer complaints or proceedings before an Ombudsman, cross-border issues are occasionally regulated on the basis of industry self-regulation,<sup>4</sup> but generally not on the basis of international legal instruments. EU law concerning consumer protection plays an increasing role in this sector, taking into account of the fact that secondary EU law aims increasingly at the establishment of effective cross-border dispute settlement systems.<sup>5</sup>

## 1.1 The Concept of Out-of-Court Dispute Settlement

The concept of out-of-court dispute settlement according to the European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market<sup>6</sup> (Directive on Electronic Commerce) is broad. In its Resolution of 13/04/99 on the draft action plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice<sup>7</sup> the European Parliament stressed the importance to facilitate the life of the individual citizen through the settlement of cross-border disputes. In electronic commerce the situation is accentuated, since here the geographical distance between the parties and concepts of territoriality are rendered less important. The Directive refers to 'out-of-court dispute settlement systems' in Recitals 51 and 52.

### **Recital 51:**

**Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.**

### **Recital 52:**

**The effective exercise of the freedoms of the Internal Market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with Information Society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that appropriate court actions are available, Member States should examine the need to provide access to judicial procedures by appropriate electronic means.**

In the Directive Article 17 deals with 'out-of-court dispute settlement'.

### **Article 17 - Out-of-Court Dispute Settlement**

**(1) Member States shall ensure that, in the event of disagreement between an Information Society service provider and the recipient of the service, their legislation does not hamper the effective use of out-of-court schemes available under national law for dispute settlement, including appropriate electronic means.**

**(2) Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.**

**(3) Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding Information Society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.**

## 1.2 The Establishment of E-confidence through Out-of-court Dispute Settlement

In electronic commerce the relations between the Information Society service and the recipient are characterised through contacts established over data networks. The parties do not have the possibility to obtain information on the basis of a traditional 'look and feel' approach during a conversation in the business's premises. Accordingly, it is more difficult for

them to rely on their senses when assessing risks concerning the trustworthiness of the other party.

The offer of dispute settlement contributes to the establishment of confidence of the parties. Particularly in the cross-border sector appropriate schemes of out-of-court dispute settlement will enhance trust in electronic commerce. The schemes to be employed by the bodies responsible for the out-of-court dispute settlement vary. Basically, it may be expected that the following bodies will be interested in developing out-of-court dispute settlement schemes for electronic commerce:

- first, the traditional bodies of the institutional arbitration, such as the International Chamber of Commerce (ICC), and the bodies established at the traditional international centres of arbitration, which offer services of contractual arbitration;<sup>8</sup>
- second, the traditional bodies dealing with contractual mediation and conciliation; these are, basically, the same bodies of the institutional arbitration, insofar as they have expanded their services to offer contractual mediation and conciliation;
- third, the traditional bodies dealing with consumer arbitration, mediation and conciliation established on the basis of national laws;<sup>9</sup>
- fourth, the newly created bodies dealing with out-of-court dispute settlement in electronic commerce which make use of online technologies.<sup>10</sup>

It can be expected that through the establishment of an effective legal framework for out-of-court dispute settlement in the sector of electronic commerce the confidence in cross-border transactions will be enhanced so that the Internal Market for electronic commerce will become a reality for Information Society services and recipients.

### **1.3 Reduction of Risks for Cross-border Electronic Commerce through Out-of-court Dispute Settlement**

In the sector of cross-border electronic commerce several factors concerning legal issues increase the risks for the parties to develop a satisfactory exchange of performances. Such risks derive particularly from uncertainties concerning the possibility to obtain legal redress in the case of a failure of the transaction, the law applicable to the transaction, the necessity to deal with a foreign legal system and problems relating to languages and differences in legal terminology. Due to its fragmented legal structure such risks increase in the Internal Market, because in application of the Treaty of Amsterdam the efforts aimed at the harmonisation and approximation of laws are basically directed towards the establishment of similar economic conditions, with due observance of the principle of subsidiarity.<sup>11</sup> Article 3(1)(h) of the EC Treaty defines as an activity of the Community the approximation of the laws of Member States to the extent required for the functioning of the common market. The unification of the laws of Member States is not envisaged. This means for Information Society services and recipients that they may have to count with the application of different legal rules if they venture into cross-border transactions even within the Internal Market.

Empirical studies show that consumers tend to buy local, because they want to avoid risks deriving from problems related to guarantees and service.<sup>12</sup> Similar reasons relating to the avoidance of risks may induce recipients who are residents in a Member State to refrain from accepting offers by Information Society services established in other Member States. But also Information Society services may be reticent to deal with recipients from other Member States, unless it is clear that their activities will be recognised by the relevant legal order.

The possibility to make use of an efficient out-of-court dispute settlement system is likely to decrease the risks which derive from the existing legal uncertainties. The traditional cross-border litigation is time consuming and costly. The party which is not familiar with the court

system in the Member State where the litigation takes place may feel disadvantaged, because it is less able to assess the state of the proceedings due to the lack of information concerning the legal system, the geographical distance dependence on the advice of foreign advocates and, possibly, the use of a foreign language.

The acceptance of out-of-court dispute settlement systems is very much rooted in cultural traditions. (Out-of-court) dispute settlement is not only known to the modern industrialised world, but it can also be found in ancient African, American and Asian cultures.<sup>13</sup> It may thus claim to have a longer tradition than dispute settlement by the courts.

The establishment of an out-of-court dispute settlement system which clears these deficiencies will be able to contribute to the avoidance of the misallocation of resources in the public interest and to cost efficiency in the private interest. The benefit to the general public will be generated through an increase of competition between Information Society services within the Internal Market which ensures an improved offer for users.

## 2 The Parties involved in Out-of-Court Dispute Settlement

The Directive concerns Information Society services and recipients of such services. This study refers to these addressees, however, it is envisaged that also services which do not fall within the scope of the Directive, possibly because they are supplied free of charges, will adjust the providing of services according to the rules indicated by the Directive.

### 2.1 The Information Society Service

The term 'Information Society service' to which the Directive on Electronic Commerce refers in Article 2(a) is defined in Article 1(2) of the Directive 98/48/EC of 20/07/98 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations.<sup>14</sup> Such a service means *any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition:*

- *'at a distance' means that the service is provided without the parties being simultaneously present,*
- *'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electro-magnetic means,*
- *'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.*

The definition continues:

*This Directive shall not apply to:*

- *radio broadcasting services,*
- *television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC 'television without frontiers, as amended by Directive 97/36/EC.'*<sup>15</sup>

According to Article 2(b) of the Directive of Electronic Commerce the term 'service provider' means *any natural or legal person providing an Information Society service*. Thus Information Society service providers are those persons or organisations which provide Information Society services.

### 2.1.1 The Term 'Information Society Service'

The Directive states in Recital 18 that *Information Society services span a wide range of economic activities which take place online*. Thus it covers services which, *in particular, consist of selling goods online*. However, the delimitation of such services from other services using digital communication, may not always be easy, in particular with regard to telecommunication or broadcasting services.

#### a.-) The Commercial Nature of the Service

The definition of the term 'Information Society service' in Directive 98/48/EC of 20/907/98 amending Directive 98/34/EC laying down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations<sup>16</sup> focuses on the definition of the term 'service' by the case-law of the European Court of Justice, and it indicates in Recital 19 of that Directive that *therefore 'services' means those normally provided for remuneration*. It explains that *that characteristic is absent in the case of activities which a State carries out without economic consideration in the context of its duties in particular in the social, cultural, educational and judicial fields* and that *national provisions concerning such activities are not covered by the definition (...) and therefore do not fall within the scope of this Directive*.

Information Society services in the sense of the Directive are services which are offered against the payment of a remuneration. However, such a remuneration does not necessarily have to be paid by the user who benefits from the service.<sup>17</sup> With regard to the modality of the financing of such services it is sufficient according to EU law if a valuable performance is made, so that also free offers which may be financed through advertising or sponsoring by third parties would be included.<sup>18</sup> Thus Internet services which are offered to users free of charges may be included in the definition, for example free email, database or webspace services. But an Information Society services in the sense of the Directive are only those services which pursue an economic activity.<sup>19</sup> Excluded from the scope of application of the Directive are, for example, private users which operate their own home pages without any commercial character on their own web servers,<sup>20</sup> and also private content providers.

Recital 18 of the Directive on Electronic Commerce stresses that services are *not solely restricted to services giving rise to online contracting but also, insofar as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data*. According to Recital 18 of the Directive it is essential, that the service develops a commercial activity, for example services offering tools for the search, access and retrieval of data. But the term *Information Society services also includes services consisting in transmitting information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service*. The deletion of the passage from a previous draft according to which the concept would also include *online activities via telephony and telefax* may permit the inference that such services do not necessarily constitute Information Society services.

From Recital 18 of the Directive it results that the question whether actually a remuneration is paid by the recipient becomes irrelevant if the Information Society service develops an economic activity. In such a case the concept of the Information Society service extends to *services which are not remunerated by those who receive them, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data*. This means for the educational sector that services offered by privately operated institutions may well be subject to the Directive whereas services offered by public educational institutions will not fall within the scope of the Directive. Since the definition of the term 'Information Society service' is based on the Directive 98/48/EC, it might have been confusing, if the Directive would use a different concept of service. However, it was suggested that the Directive should have given Member States the possibility to extend

the scope of application of the Directive to certain non-commercial service providers.<sup>21</sup> The inclusion of non-commercial services such as public universities would have had the benefit to avoid any doubts about the application of the rules concerning the liability of intermediaries.

#### b.-) Convergence of Services

By reason of the increasing convergence of technologies, definitions may rapidly be superseded. With reference to the Green Paper on the convergence of telecommunications, media and information technology sectors<sup>22</sup> the Economic and Social Committee indicated<sup>23</sup> that *converging markets are set to spawn hybrid services which combine features of different classic categories of service. In the case of multimedia applications such as television sets with integrated Internet browsers, computers able to receive television and radio transmissions (radiotelephony and Internet voice telephony), it will gradually become impossible to draw clear boundaries between individual and mass communication.*

Concerning the delimitation between broadcasting and Information Society services, Recital 18 of the Directive states that *television or broadcasting within the meaning of the Directive 89/552/EEC of 03/10/98 ('broadcasting without frontiers') (...) and radio broadcasting are not Information Society services, because they are not provided at individual request. However, by contrast services which are transmitted point to point, such as video on demand or the sending of commercial communications by e-mail are Information Society services.*

Recital 4 of the Directive specifies that the purpose of the Directive is to ensure that electronic commerce can fully benefit from the Internal Market and therefore that, as with the Directive 'broadcasting without frontiers', *a high level of Community integration is achieved.* The basic factor for the achievement of the integration of the converging services lies in the establishment of a basic regulatory system which is also used within the Directive 'television without frontiers',<sup>24</sup> and which, concerning Information Society services, is envisaged by Article 3 of the Directive. Taking into account that considerable inroads into the principle of the state of origin may be made with regard to the operation of Information Society services which are not applied to broadcasting services or telephony services, it may become necessary to clearly identify all types of Information Society services in order to achieve a delimitation from those services to which other regulatory systems apply, in particular those of broadcasting or telephony services.

#### c.-) Interactivity as a Decisive Criterion

The concept of the Information Society service does not relate to the content of the service but rather to the technology which is employed for this purpose. Such a 'service performed by electronic means' transmits content by means of a particular equipment which can be used for the electronic processing and storage of data at the place of the transmission. From there the data are transmitted either by wire, broadcasting or electro magnetic waves and received at the place of reception.<sup>25</sup> Thus services which use 'offline' communication and services which are provided in real time without a processing and without a storage of data, do not fall within the scope of the Directive.

Services which are provided electronically concern, for example, the distribution of goods by distance contracts, teleshopping, electronic publishing or the providing of access to particular online offers such as databases containing data concerning legal or commercial material or data relating to the protection of the environment. It appears to be questionable whether access providers fall within the definition of such services. The definition mentioned above includes services which are performed by electronic means, however, the scope is limited to those services which are transmitted by means of particular equipment for the electronic processing and storage of the data from the place of transmission and which are received at

the place of reception. Access providers do not themselves perform a particular service which is supplied via the Internet, but they constitute a part of the Internet, namely a portal or an access. In Article 13 of the Directive which concerns the access providers' liability the Commission the Directive proceeds upon the assumption that also the providing of access falls within the scope of the Directive. Therefore, it appears to be reasonable to assert a broad definition of Article 2 of the Directive so that also the activities of access providers would be included.

Since broadcasting services in the sense of the Directive 'television without frontiers'<sup>26</sup> are not supplied on an individual demand, that is to say by means of an interactive invention by the recipient, but distributed simultaneously to a multitude of persons, such services do not fall within the scope of application of the Directive.<sup>27</sup> These services differ from Information Society services by reason of the simultaneous and unmodified transmission of signals and information to an undetermined number of recipients.<sup>28</sup> In the case of distribution services the unilateral determination of the time, duration and content through the service itself are characteristic. Thus even Internet-tv services by means of which, for example, concerts or sports events are transmitted via the Internet, do not seem to fall within the scope of term 'Information Society service', because a user can not interactively modify such a signal. Accordingly, the 'Internet-broadcasting' or 'web-casting' may not be considered as an Information Society service in the sense of the Directive, because the user has no possibility to influence the signal interactively. With a similar reasoning also the 'broadcasting on demand' which consists in the online transmission of an already broadcast broadcasting programme on the user's demand might not fall within the scope of the definition of the term 'Information Society service', since the user can not modify the content. However, it is suggested that as soon as the technology permits a user to influence interactively the development of the transmission, for example of a film, the service would have to be considered as an Information Society service.<sup>29</sup>

#### d.-) Overview

Information Society services and other services:

- (1) Information Society services (if performed on an economic basis)
  - (1.1) on-demand services with interactivity;
  - (1.2) electronic publishing with interactivity;
  - (1.3) email services;
  - (1.4) webspace services;
  - (1.5) web-tv with interactivity.
- (2) No Information Society services.<sup>30</sup>
  - (2.1) Services not provided at a distance:
    - services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices
      - (2.1.1) medical examinations or treatment at a doctor's surgery using electronic equipment where the patient is physically present;
      - (2.1.2) consultation of an electronic catalogue in a shop with the customer on site;
      - (2.1.3) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers;
      - (2.1.4) electronic games made available in a video-arcade where the customer is physically present.

- (2.2) Services not provided by electronic means:
  - (2.2.1) services having material content even though provided via electronic devices:
    - (2.2.1.1) automatic cash or ticket dispensing machines (banknotes, rail tickets);
    - (2.2.1.2) access to road networks, car parks, etc., charging for use, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment is made;
  - (2.2.2) off-line services: distribution of CD-ROMs or software on diskettes;
  - (2.2.3) services which are not provided via electronic processing/inventory systems:
    - (2.2.3.1) voice telephony services;
    - (2.2.3.2) telefax/telex services;
    - (2.2.3.3) services provided via voice telephony or fax;
    - (2.2.3.4) telephone/telefax consultation of a doctor;
    - (2.2.3.5) telephone/telefax consultation of a lawyer;
    - (2.2.3.6) telephone/telefax direct marketing.
- (2.3) Services not supplied at the individual request of a recipient of services:
  - services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):
    - (2.3.1) television broadcasting services (including near-video on-demand services), in the sense of Article 1 letter (a) of the Directive 89/552/EEC 'television without frontiers';
    - (2.3.2) radio broadcasting services;
    - (2.3.3) televised teletext.
- (2.4) Summing up, no Information Society services are:
  - (2.4.1) broadcasting services in the sense of the Directive 'television without frontiers';
  - (2.4.2) telecommunications services;
  - (2.4.3) webphoning;
  - (2.4.4) teleshopping if broadcast in real time without processing of data;
  - (2.4.5) distribution services;
  - (2.4.6) web-tv without interactivity;
  - (2.4.7) interactive services which are not performed for commercial purposes. Founding

### 2.1.2 Operation of Information Society Services in the Internal Market

Basic rules concerning the operation of Information Society services are addressed by Recital 22 of the Directive. Accordingly, *Information Society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives.* This Recital also explains that *to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens. But in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such Information Society services should in principle be subject to the law of the Member State in which the service provider is*

*established.* The Recital states that *in order to improve mutual trust between Member States it is essential to state clearly this responsibility on the part of the Member State where the services originate.*

The state of origin principle is established in Article 3 of the Directive on Electronic Commerce. According to Article 3(1) of the Directive *each Member State shall ensure that the Information Society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.* The Directive thus establishes the principle that an Information Society service should be subject to the law of the Member State in which the service provider is established. Electronic commerce within the Internal Market remains closely related to the traditional legal concept of territoriality. How can the place of establishment of a service provider be determined in cyberspace? Recital 19 of the Directive refers to the case law of the European Court of Justice according to which *the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period,* and it explains that this requirement is fulfilled even if a company is constituted for a given period. The place at which the technology supporting a service provider's website is located remains irrelevant for the assessment of the place of establishment according to Recital 19 of the Directive. Also the place where the website is accessible does not count. Decisive is the place where the service provider pursues its economic activities. If a service provider has different places of establishment, it will be relevant the place from which the service concerned is performed. *If it is difficult to determine from which of several places of establishment a given service is provided this is the place where the provider has the centre of his activities relating to this particular service.*<sup>31</sup>

## **2.2 The Recipient of the Information Society Service**

The definition of the 'recipient' of an Information Society service is broad, including natural or legal persons, consumers or businesses.

### **2.2.1 Definition of the Term 'Recipient'**

Article 2(d) of the Directive on Electronic Commerce defines the term 'recipient of the services' as *any natural or legal person who, for professional ends or otherwise, uses an Information Society service, in particular for the purposes of seeking information or making it accessible.*

Recital 20 of the Directive states that the definition of the '*recipient of a service*' *covers all types of usage of Information Society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.* Thus also Information Society services may be recipients, provided that they use an Information Society service, for example in the case of intermediary Information Society services.

### **2.2.2 The Recipient and Consumer Protection**

Recipients may be consumers, and as such they receive particular protection according to the Directive on Electronic Commerce. Since this protection is of particular relevance with regard to out-of-court dispute settlement systems, the concept relating to consumer protection which is used in the Directive shall briefly be referred to.

#### **a.-) The Definition of the Term 'Consumer'**

Article 2(e) of the Directive defines the term 'consumer' as meaning *any natural person who is acting for purposes which are outside his or her trade, business or profession.*

This definition excludes a broad interpretation of the term which might include also those persons who commission goods or services for SMEs. It thus excludes legal persons from the scope of consumer protection.<sup>32</sup>

In the sector of consumer protection law, there is no unitary definition of the term 'consumer'. Also the definitions in the Brussels<sup>33</sup> and Rome<sup>34</sup> Conventions use different terminology. The development of the legal term 'consumer' has to be seen in the historical context, taking into account of the increasing political interest in consumer protection. The Commission developed its programme concerning the protection and information of consumers since 1975.<sup>35</sup> In the contractual sector the protection of the consumer as the weaker party aims at the maintenance of the balance of power between the parties.

Definitions of the term 'consumer' are also contained in other instruments of EU secondary law such as in Article 2(b) of the Directive on Unfair Terms in Consumer Contracts,<sup>36</sup> Article 1(2)(a) of the Directive for the Approximation of Laws concerning Consumer Credit,<sup>37</sup> Article 2(2) of the Directive on Distance Contracts<sup>38</sup> or Article 1(2)(a) of the Directive on the Sale of Consumer Goods and Associated Guarantees.<sup>39</sup> However the definitions vary slightly so that it would be difficult to establish a unitary concept of the consumer according to EU law. For example, the definition in the Directive on the Sale of Consumer Goods and Associated Guarantees states: *'Consumer' means any natural person who, in the contracts covered by this Directive, is acting for purposes which are not directly related to his trade, business or profession.* This definition demands the evaluation whether the individual transaction was or was not directly related to a business, and it seems to include transactions which are indirectly linked to business purposes.

The Directive for the Approximation of the Laws, Regulations and Administrative Provisions of Member States concerning Consumer Credits<sup>40</sup> focuses in Article 1(2)(a) on the activity for purposes which can be regarded as outside of the trade or profession. Differently, again, Article 2(b) of the Directive on Unfair Terms in Consumer Contracts<sup>41</sup> bases the definition on the activity which is outside of the trade or profession. The definition of the term 'consumer' in the Distance Contracts Directive<sup>42</sup> requires in Article 2(2) that there is no direct relation with any business. The consumer must have acted for purposes which are not directly related to his trade, business or profession. Thus due to the lack of coherency in the definition of the term 'consumer' it may be difficult for the legislation of Member States to develop a unitary concept of the 'consumer'.

In the jurisprudence of the European Court of Justice the concept of the trade, business or profession has found a broad definition, including any activities of a person relating to his business or profession which are not covered by private needs.<sup>43</sup> Whether a person can prove that the transaction did not relate to business purposes depends on the rules on evidence according to the national laws. It may be assumed that in the case where there is a mixed use, the prevailing purpose may be decisive.<sup>44</sup>

#### b.-) The Identification of the Consumer

It is difficult for the Information Society service to verify the recipient's purpose of the transaction, whether it constitutes a consumer contract or not. Could it be assumed that an Information Society service will be justified to consider that a professional, a businessman or a tradesman will be acting at least indirectly for his profession, business or trade if he uses for his orders the email of his vocation? Obligations on information concerning the quality of a consumer are not imposed on the recipient by the Directive on Electronic Commerce. It appears that objective standards should be used according to which the quality of the recipient as a consumer would have to be assessed by a man standing in the shoes of an independent third person.

In order to facilitate the Information Society service's decision whether it would like to conclude a contract, it is recommendable, if the Information Society service obtained an information by the other party about its quality, for example through the reply to the Information Society service's question asking in its online forms whether the transaction is covered by purposes within trade, business or profession or not. Such a reply could be solicited by offering corresponding 'clicks' on the Information Society service's website.

### 2.2.3 Consumer Contracts Between Information Society Services and Recipients

Rules establishing consumer protection focus in particular on contractual obligations.

#### a.-) Consumers and Consumer Contracts

Whereas the Directive provides in Article 2(e) a definition of the consumer which is similar to the definition used by the relevant secondary EU law, other legal instruments focus on the definition of the consumer contract.<sup>45</sup> The definition of the terms consumer and consumer contract by EU law permits the coverage of a large variety of relations between the Information Society service and the recipient. But the definition in the relevant Directives permits the application only with regard to the scope to which the Directive relates. Thus the broad definition of the term 'consumer' is limited with regard to the coordinated field which is regulated by the Directive. It may be alleged that the national laws of Member States which cover the variant situations to which the relevant secondary laws of the EU are applicable, will use a broad concept of the consumer and of consumer contracts which comprehend the different facts. Accordingly, it may be alleged that the international private laws of Member States use more or less identical concepts for the definition of the terms 'consumer' and an even broader concept of protection with regard to the scope of transactions.

#### b.-) The Identification of the Quality of the E-consumer

The Directive on Distance Contracts which could have contained provisions imposing an obligation of information on distance consumers did not establish rules for the identification of the distance consumer. Also the Directive on Electronic Commerce does not address this issue. Concerning the identification of the e-consumer an objective standard has to be applied so that it is up to the Information Society service to identify the consumer. Concerning disputes between the parties this would mean that the consumer, if he wanted to rely on provisions of consumer protection law, would have to prove the facts establishing the conditions for protection, in particular his quality as a consumer. It may be assumed that this allocation of the burden of proof corresponds with the procedural rules of most systems, whether applied to dispute settlement before the courts or out-of-court. If a tradesman concluded a contract for his business purposes online by falsely pretending that he was a consumer it will also depend on the principles of the law of evidence whether the Information Society has to prove the non-consumer quality of the recipient or the recipient his quality as a consumer. This means that a possibility, to indicate by an appropriate click on the website of the Information Society service the 'consumer' or 'business' purpose of the transaction, does not protect the Information Society against deception.

#### c.-) 'Dual Use' Contracts

Does the definition of the term consumer in the Directive also concern transactions by means of which the consumer acquires goods or services for both his private and business purposes? The Directive does not address this problem. It does not establish criteria which could be used for the delimitation between consumer and business contracts. By legal writers both opinions are asserted. According to one view also contracts which are directed towards both, the acquisition for business purposes and for private purposes will have to be considered as consumer contracts, provided that the private use is not 'de minimis'.<sup>46</sup> The other view which purports that the limitation of the freedom of contract can only be justified

insofar as this is required by the weakness of a party, only 'true' consumer contracts would fall within the scope of the Directive. With this respect the essential purpose of the transaction will be decisive. *Only if the ex-ante assessment by an objective person would permit the conclusion that the contract was prevalingly for personal purposes, the provisions of the Directive will be applicable.*<sup>47</sup> Thus it may be argued that the consumer in the electronic commerce, due to his sophistication, appears less 'weak' than a consumer in the traditional commerce, and that, accordingly, the second view may appear favourable. However, the legal instruments available do not permit a prognosis on the development of consumer protection law in the electronic commerce sector, which will depend on political decisions.

#### 2.2.4 Protection of the E-consumer

The protection of consumers in electronic commerce may require the adaptation of traditional concepts to the online environment. Discussed is in particular whether the standard of 'passivity' established by the Brussels and Rome Conventions as a condition for protection is applicable to the e-consumer.

##### a.-) Cross-border Contracts and the Concept of the 'Passive Consumer' according to the Brussels and Rome Conventions

Article 13 of the Brussels Convention defines a 'consumer contract' as a *contract concluded by a person for a purpose which can be regarded as being outside his trade or profession*. This definition does not include a professional or small trader who concludes contracts outside of his profession or trade.<sup>48</sup> The Rome Convention of 1980 asserts a concept of the 'consumer' which makes use of the words 'the consumer' in Article 5(1): *This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession or a contract for the provision of credit for that object.*<sup>49</sup> It has been suggested that this reference excludes any legal persons from the scope of applicability whereas the Brussels Convention could apply to legal persons for the reason that it does not limit the concept to natural persons.<sup>50</sup> However, national laws implementing the Brussels and Rome Conventions in the international private law and in the international law of civil procedure of Member States may use broad definitions of the term consumer which comprise such concepts without being necessarily identical.

A particular complication for the application of the term 'consumer' to electronic commerce derives from the fact that the beneficiary of the regulations concerning consumers in the Brussels and Rome Conventions is only the 'passive' consumer. According to Article 13(1) No. 3 of the Brussels Convention the application of the rules on protection is dependent on the fulfilment of certain conditions. Thus it is required that the conclusion of the contract was preceded in the State of the consumer's domicile by specific invitation or advertising and that the consumer took the necessary steps for the conclusion in that State.<sup>51</sup> The concept of the consumer contract according to Article 5(2) of the Rome Convention is more precise. It requires that the conclusion of the contract was preceded by specific invitation or advertising in the country of habitual residence of the consumer and the consumer has taken in that country all the steps necessary on his part for the conclusion of the contract, or the other party or his agent received the consumer's order in that country, or the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.<sup>52</sup>

There may be exceptions to the limitation of the protection to the 'passive' consumer. According to the Rome Convention, for example, also the active consumer may be included in the protection in the case of insurance contracts.<sup>53</sup>

Differently, the secondary EU law does not focus on the differentiation between 'passive' and 'active' consumers. Thus the Directive on Distance Contracts merely focuses on the *close connection between the conclusion of the contract and the country of residence of the consumer*.<sup>54</sup>

The 'active consumer' is considered to be a *private person acting outside his or her commercial or professional activity and shopping around in the Union for goods or the provision of services*.<sup>55</sup> The particular provisions which protect the 'passive' consumer are not applicable to the 'active' consumer. Thus in the context of the Brussels and Rome Conventions, a distinction has to be made between the consumer on the defending side (whether he or she has previously been passive or active with regard to entering into the transaction) and on the plaintiff side. Different jurisdiction rules and different rules concerning the law applicable to the contract will apply, depending on whatever procedural role the consumer takes.

#### b.-) The Application of Consumer Protection Schemes of the Brussels and Rome Conventions to the Recipient

The protection of the recipient in application of the Brussels and Rome Conventions in the cross-border electronic commerce environment encounters difficulties, since *these conventions were prepared at a time before the Internet existed and the consumer protection provisions that exist are inappropriate for this new electronic commerce. There is substantial uncertainty as regards interpretation of the special preconditions that the conventions lay down for a consumer to be able to adduce the law of his own country and litigate in his own country's courts*.<sup>56</sup>

Two approaches seem to be possible concerning the online consumer. First, one may attempt to apply existing rules to the online environment, for example comparing the online conclusion of contracts with contracts concluded by telephone conversation, fax or other distance contract means. Second, one may consider that the Internet consumer is an 'active' consumer who 'travels' online to those 'territories' where the Information Society services are established which offer their goods and services via websites. However, this approach seems to focus on the quasi-territorial approach which may claim a justification in the practical use of country-code Top Level Domains (ccTLDs) such as *.fr*, *.de*, *.it* or *.uk*. But since websites are also managed with generic Top Level Domains (gTLDs), such as *.com* or *.org*, the quasi-territorial approach is not convincing. The decisive criterion for the allocation of a 'quasi-territory' seems to be the place of the business as indicated on the website, no matter whether the Information Society service uses a gTLD or a ccTLD. From the legal point of view the use of websites by businesses thus should be analysed as a means for the marketing of its products and services. Accordingly, no general assumptions concerning the 'activity' or 'passivity' of Internet consumers seem to be justified. The analysis of the use of the Internet according to the different factual circumstances indicated in Article 5(2) of the Rome Convention and also in Article 13(1) of the Brussels Convention has to be made with reference to the traditional concepts developed by jurisprudence.

#### c.-) Justification of the Protection of the Recipient as E-consumer

It has been asserted that also 'sham' consumers may merit protection if they acquire goods for the benefit of a third professional.<sup>57</sup> In online relations it may often be impossible for the Information Society service to assess whether the person he deals with online acts for his personal or business purposes. Thus a viable possibility for the Information Society service to obtain information on the recipient's quality would be to ask him in an online form whether he acts for business purposes or as a consumer. Such an identification would also be useful with particular regard to the application of online general terms of contract.

Apart from the difficulty concerning the identification of the quality of the recipient as a 'consumer' in electronic commerce, the online marketing may render it increasingly difficult to justify the separation between a labelled 'consumer' who buys his luxury car online and an SME staffed with one person which commissions writing paper over the Internet. Yet for political reasons it may be difficult to limit the existing scope of the definition of the term consumer with regard to those transactions which concern only ordinary needs on the one hand and to extend the scope of the definition to impecunious SMEs on the other hand.

New challenges for the definition of the term consumer develop also from new marketing strategies in the online environment: *The new marketing strategy makes it much more difficult to draw a clear cut borderline between the final consumer and the direct seller in the traditional sense. It seems as if a new category of a consumer is about to emerge here, which cannot be covered fully neither by the notion of the final consumer nor by the notion of a direct seller.*<sup>58</sup> Additionally, Internet consumers are often persons with a higher education which speak several languages and which are used to conclude contracts for trade, business and professional purposes over the Internet. Whether such persons need consumer protection at all may be questionable if such a protection would, by means of mandatory rules of law, lead to a degradation which factually limited their capacity to contract as if they were minors. A possible solution to this dilemma could be offered by the limitation of the concept of consumer protection to those transactions which, from their object, are easily identifiable as relating to consumption. However, neither jurisprudence nor the secondary law of the EU permit an inference that the law would be developing into this direction.

#### d.-) Protection of the Recipient as a Consumer in Computer Networks

Critical voices assert that *every indication is that the previously acquired rights of protection and safeguards put in place on behalf of the general consumer in 'realspace' are increasingly being eroded to the detriment of the Netconsumer.*<sup>59</sup> However, this does not necessarily have to be the case, particularly, if a solution of cross-border disputes can be established which provides the consumer with an efficient means of redress and legal security about the laws and rules to be applied within the out-of-court dispute settlement procedure. It should not be overseen that the cause for the alleged erosion of consumer protection in electronic commerce would be seen not in the insufficiency of a national system for the protection of the consumer, but in the problems deriving from the application of the different national systems to transactions over the Internet for which national borders and territories have less significance than for the traditional commerce. The answer to the possible confusion about the applicable consumer protection rules should thus not lie in the lowering of the degree of protection but in the establishment of an efficient system which recognises the interests of the States involved in the observance of their national legal systems which were established with the purpose to protect the weaker party in consumer contracts.

#### e.-) E-confidence and the Cross-border Consumer

The increase in the number of cross-border contracts has created a multi-faceted spectrum of the relations between the international private law and regulations of consumer protection, in particular since the definition of the term 'consumer' may differ and since also the scope of the object of protection, namely a particular contractual relation, may be defined in different terms. Whereas the international instruments such as the Brussels and Rome Conventions protect the 'passive' consumer, however, within a broadly defined contractual situation, the relevant secondary EU law generally does not differ between active and passive consumers, but it provides for protection in certain defined circumstances. National consumer protection laws, by implementing Member States' obligations under the Conventions and Directives, add another layer of protection. This layer may be more easily comprehensible if the rules of consumer protection are contained in a special code on consumer protection. Taking into account of the fact that the Directives may permit Member States to draft stricter rules than

those contained in the Directives, it could not be expected that a high degree of harmonisation of the consumer protection law in Member States would be established. This, however, might create uncertainties for Information Society services when developing their marketing policies for the Internal Market. If such services could count with the application of the 'state of origin' principle in a broad sense, covering jurisdictional issues and conflict of laws, they would be much helped. In such a case the need for the regard of consumers' interests would demand the establishment of protective rules. Such rules could either be provided by the national legal system of the Member State of origin or they could be based on an instrument of secondary EU law. In the latter case, a unitary set of rules could establish consumer protection in computer networks providing for increased legal security of consumers in cross-border contracts within the Internal Market.

The balancing of the interests involved might lead to the careful re-establishment of the principle of freedom of contract between the parties. Such a re-establishment might be realised not by inciting the parties to the individual negotiation of the terms of their contract with due regard to the relevant national legal system, but by developing guidelines and codes which draw their essential elements from the relevant legislation of Member States. The bodies responsible for out-of-court dispute settlement might communicate such guidelines and codes online and thus contribute to the creation of legal security concerning cross-border contracts. The parties, by selecting a certain body responsible for out-of-court dispute settlement would, at the same time, choose the proposed guidelines and codes as the law applicable to their contract respectively as the law by means of which the dispute shall be settled. However, this does not mean, that the freedom of contract would be limited to the choice offered by the body responsible for out-of-court dispute settlement. The parties may develop their own contractual stipulations. However, the idea of the communication of guidelines and codes by the bodies will enhance e-confidence by permitting those parties who are not experienced in the negotiation of international contracts to resort to an easily applicable system, particularly adapted for the needs of cross-border electronic commerce.

### 2.2.5 Political Developments Concerning the Protection of the E-consumer

In recent months the political discussion was concerned with developments of consumer protection in the sector of electronic commerce.

#### a.-) Protection of Consumers and the Opinion of the Economic and Social Committee

The Opinion of the Economic and Social Committee of 15/04/99<sup>60</sup> reflects the current discussion of the consumer protection in cross-border contracts of electronic commerce, and therefore the relevant passages are reproduced. In No. 3.6.4. of the Opinion the Committee was particularly concerned with the relation between the 'state of origin' principle according to Article 3 of the Directive and consumer contracts. Annex II of the Directive exempts contractual obligations concerning consumer contracts from the application of the state of origin principle. The Opinion states in the general comments:

*3.3. The Committee expressly welcomes the accompanying consumer protection measures set out in the proposal (e.g. information to be furnished by the provider, development of out-of-court dispute settlement). The Committee feels it is crucial that electronic commerce should not be promoted at the expense of consumer protection standards. (...)*

*3.6. The country-of-origin principle applies to those areas which, although not harmonised by the directive, still fall within its scope. This means that the legal arrangements of the country in which the service provider is established apply. The point of departure is the view that it is difficult for providers to be guided by the law of the countries in which they do business. (...)*

*3.6.2. The Committee broadly endorses the idea behind the country-of-origin principle. It cuts the legal costs of information society service providers and thus works to their advantage,*

*essentially as desired. It also makes for better implementation of protective measures by the appropriate authorities in the country of origin.*

*3.6.3. On the demand site, however, and for consumers in particular, the application of this principle means grappling with various legal systems which determine the content, quality and legal certainty of information society services. National systems differ and conditions often vary quite considerably as a result. In practice, therefore, this principle may pose risks to users in cases where their own countries' arrangements no longer afford the requisite protection.*

*3.6.4. Since the consumers of one Member State may be unfamiliar with the rights under the law of another State where the service provider is based, the Member States and the European Commission should ensure the rapid establishment of a cross-border network of consumer protection agencies or ombudsmen to act as conduits and possibly arbitrators in the event of disputes between consumers in one country and service suppliers based in another. Such a network would preserve the concept of the single market while providing simpler, cheaper and more effective means of redress for consumer than litigation, although their right to initiate litigation if they remained dissatisfied would remain.*

*3.6.5. Thus, while fully understanding simplification as far as the provider is concerned, the Committee feels that, as long as high-level harmonisation is lacking, an extremely responsible approach is called for here and further consideration is required. The draft directive backs such an approach, setting out areas in which the general principle is not fully brought to bear.*

*3.6.6. The Committee would suggest that further exemptions may be justified where Member States' legal systems vary widely or in areas considered highly sensitive by public opinion in the Member States (e.g. advertising directed at children, games designed for advertising purposes, medicinal products sold by mail order, regulated professions). The blanket application of the country-of-origin principle, for example in advertising, could expose consumers to advertising practices which they have never before encountered. In sensitive areas especially, 'forum shopping' i.e. where the choice of location is based on where the rules are most favourable for the provider, would raise difficulties, particularly since SMEs have only limited scope in this regard. Principles should therefore be established as a guide for determined areas in which the country-of-origin principle applies and areas where, as yet, this is not possible. No one disputes that such consideration should not be allowed to generate obstacles to the single market. Beyond that, the aim over time should be to achieve high harmonised standards.*

#### **b.-) Protection of Consumers and the Draft Report of the European Parliament on the Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters**

The Draft Report of the Committee on Legal Affairs and the Internal Market of the European Parliament, concerned with the proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters<sup>61</sup> deals with out-of-court dispute settlement systems within the Explanatory Statement. Referring to the extension of the derogations concerning jurisdiction for the benefit of consumers the Report stressed that the Commission should propose *alternative, more realistic dispute-resolution procedures to be adopted as a package at the same time as the regulation*; make it clear that only *active* Internet sites are affected by the provision; establish that the regulation is concerned only with where consumers may sue and not with the law applicable to the contract which remains that of the supplier's country of origin.

In the concluding remarks the Committee expressed the view that the *Commission should liaise with interested parties, especially the banking and credit-card industry and consumer groups, in order to coordinate efforts to design alternative dispute-resolution schemes for Internet trading*. Also the idea was advanced that credit card companies could be involved in

these mechanisms, for example through the chargeback system by means of which the user may claim a compensation for certain losses from his bank if the basic transaction fails.

### c.-) The Development of the EU Commission's Policy

On 21/01/00 Commissioner Liikanen said in his speech on 'eEurope: An Information Society for All' that by the end of 2000 online dispute settlement and alternative consumer redress procedures should be encouraged. The Commissioner Byrne is reported to have said on 03/03/00 at the European Consumer Center in Dublin on 'Making the virtual virtuous - towards a new approach to e-Consumers': *Europe must move swiftly to overcome the consumer confidence barrier in e-commerce to ensure the development of a Single Online Market. Speaking on behalf of the Commission, Mr Byrne suggested measures to encourage quality and service in e-commerce, and to ensure legal redress when things go wrong, allowing the European online market to achieve the same success as in the United States. 'In this cybereconomy, without the traditional reassurance of bricks and mortar, a new policy environment is needed to help overcome the barriers to consumer confidence,' he said. 'And for many businesses consumer confidence is the holy grail. If we are to succeed in bringing the European economy online we need to act quickly to overcome the consumer confidence barrier.'* The Commissioner said the time is right for the Commission to define a new approach to e-commerce and e-consumers, and proposed three core elements requiring attention. To ensure that most transaction are trouble free, he said the Commission should take steps to encourage a market environment that rewards best business practice, such as stimulating the development of trustmarks on the web and mobilising financial services to provide credit cards and chargeback facilities. Commissioner Byrne also wished to promote easy to use out-of-court settlement procedures, including a range of alternative dispute resolution (ADR) mechanisms and linking up to a network of existing EU national ADR schemes. There should also be a legal safety net with the court as last resort in order to guarantee justice. Additionally, it was recommended that the Commission should work closely with the US to set up the rules of the game for the emerging e-commerce marketplace.

Commissioner Bolkestein said in Nijenrode, Breukelen, on 27/03/00 on the issue 'Is Europe Ready for the New Economy', that the need to foster consumer confidence in cross-border electronic commerce transaction should be ensured by maintaining a high level of protection and ensuring efficient access to redress – both non-judicial and, if necessary, through the courts. The Commissioner indicated: *In fact, the traditional court dispute resolution system is usually too slow and heavy in the rapid and fast developing online environment. Therefore, the Commission works actively to encourage development of alternative, out-of-court dispute resolution (ADR) in close cooperation with consumers and industry.* The Commissioner warned, however, that it might also take time to make the ADRs fully operational. Referring to the Brussels and Rome Conventions he stated: *For this reason the work related to the revision of 1968 Brussels Convention on jurisdiction and 1980 Rome Convention on applicable law to contractual relations is closely related to the development of electronic commerce. The specific characteristics of electronic commerce should be full taken into consideration in this revision work. In fact, the proposed revision of the 1968 Brussels Convention on jurisdiction has sparked considerable concern among European industry. Their main concern is that the 'Brussels Regulation' could dissuade European companies, and in particular small and medium-sized companies, from going online and hence stifle the development of e-commerce within the European Union. Along with my colleagues I am therefore actively engaged in a reflection within the Commission on this issue, notably on how best to ensure legal and political coherence with the electronic commerce directive. The Brussels Regulation is also currently in the European Parliament, which will give its opinion on the proposal. In this context, I would also like to point to the revision of the 1980 Rome Convention on applicable law to contractual relations (Rome I) which would integrate the Convention into secondary Community law. No draft exists yet, but like with the revision of Brussels Convention, the impact of any eventual draft on electronic commerce must be*

*properly evaluated. As regards applicable law to non-contractual obligations (Rome II), there is no existing Convention on Community level. The work on common rules to deal with the question of which law should apply to cross-border non-contractual obligations has already started, but more analysis and consultation of interested parties is necessary before any decisions are made.*

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<sup>1</sup> P. KLEVE, R.V. de MULDER and J.G.L. van der WEES: "Re-engineering Dispute Resolution in an EDI-environment", *Law, Computers & Artificial Intelligence*, vol. 4, no. 1, 1995/25-32 at 25.

<sup>2</sup> In the US more than 95% of corporate lawsuits are settled without trial, see Christian BÜHRING-UHLE: "Arbitration and Mediation in International Business", Kluwer, The Hague 1996 at 269.

<sup>3</sup> Vincent GAUTRAIS, Guy LEFEBVRE, Karim BENYEKHLIF: "Droit du Commerce Electronique et Normes Applicables: L'Emergence de la Lex Electronica", *Le Droit des Affaires Internationales, Forum Européen de Communication*, 1997, No. 5, pp. 547-583 at 564-566: "In international commercial law, institutions that deliver arbitration sentences occupy a fundamental place in the process of production of norms. The creative role of these institutions is frequently referred to in the doctrine. In the context of the electronic commerce, even though the legitimacy of such recently created institutions probably requires a rather important time lapse, we still think it is necessary to have an interest in them. From the arbitration experiences that could be observed in cyberspace, we will focus on two. The first starts in the beginning of march 1996, with a rowdy publicity effort: "the Virtual Magistrate Project". This American project, uniting specialised legal experts, displays "online" sentences to all the persons that accept to submit to this forum. It was launched., for the first time, by a few professors at the Villanova Centre for Information Law and Policy. The Cyberspace Law Institute is also involved in the process. Other than these organisms, this new institution is also supported by the American Arbitration Association (AAA), arguably the most influential arbitration court in the United States. It seems that the basic idea was to arouse by its low costs, the interest of users and thus to create a practice that relates as much to the decision-making content as to the procedure to be followed. While recognising the swiftness with which this group of Americans created a cyberspace-specific arbitration process, we must unfortunately note that among the submitted requests only one gave rise to a sentence. One of the reasons that could eventually explain the modest success of this project, is the limit that was imposed by the Virtual Magistrate relative to its field of application. So, according to what could be read on multiple occasions on the site among others in its "FAQ", the questions related to the electronic commerce cannot be studied by this forum. That is definitely unfortunate since, in addition to depriving itself of a vast and expanding domain, it does not take into consideration a community of individuals, the business community, that pays a lot of attention to the usage that keep evolving. Therefore, the Virtual Magistrate cannot constitute a "usage catalyst" in this domain, as could have been expected. The other criticism that could be mentioned is that this pilot project deliberately uses an "adjudicative" approach. Even if we agreed that arbitration is a less formal procedure than those found in the classical juridical instances, it is nonetheless true that this vehicle contains the opposition of one party relative to another. When a plaintiff estimates that his rights were affected by the use that another person made of cyberspace, it is often difficult to incite the defendant to join in the arbitration ruling. Not having consented to anything, he lives in the fear of seeing the plaintiff apply to a national instance. Now, in a lot of cases, this threat is almost non-existing, considering the moderateness of what is at stake, the cost of a trial, the international character of the disputes, the doubts as to the success of the case etc.

Following these examples, a second experience in the domain of dispute settlement in cyberspace must be mentioned: the Cybertribunal. Started in the Centre de recherche en droit public, at the Faculty of Law of the University of Montreal, in September 1996, this experience used, as we will see, the example of the Virtual Magistrate to guide the process. But first of all, the Cybertribunal possessed interesting characteristics: first, it offers the specificity of making the service available in both French and English. Second, the Cybertribunal is the product of an institution that is situated in a dual country, gathering jurists who face, closely or from far, a certain juridical biculturalism. Without a doubt this double influence, of both civil law and common law, is of great importance in a domain that is highly disposed to comparison and internationalism. These two characteristics are not without importance, in compliance with the idea which states that if geographical borders were no longer existing they would be replaced by cultural frontiers. Language and law constitute, without any doubt, examples of these new barriers that have to be taken into consideration. Other than these economic facts, there are others that allow the marking of major distinctions with the Virtual Magistrate previously mentioned. First of all, the field of application over which the Cybertribunal is supposedly competent, is much larger. Even if there are unavoidable limits, these are still minimal. First, a sentence will only be rendered if all parties consent to submit to this forum. Also, the Cybertribunal will not settle questions related to public order. Finally, it deals only with questions that concern the law of new information technologies. Another important distinction

with the American project is that the Cybertribunal opted for a more cooperative attitude by favouring mediation over all other adjudicative procedures. Even though numerous specific arbitration procedures are in fact available, these are all preceded by a mediation phase where, in addition to trying to appreciate the conflict between the parties, it works on starting a dialogue between them. In many cases, it is even predictable that the settlement of the disputes will not reach the arbitration stage. In accordance with this approach the Cybertribunal therefore opts, at least prior to each case that is presented to it, for an approach that is not very juridical. It rather tries to examine the conflict as well as the cyberspace community involved in the dispute, in order to come up with an answer that responds as much as possible to the needs of each party. This suggestion of "cyber-justice" is therefore attentive to the cybernetics space that it tries, not only to regulate, but also to render more efficient. According to this approach, it is only by avoiding the intrusion of the juridical, which irritates Internet users who call for auto-regulation, that the cyberspace will find an appropriate organism that will offer the best possible service: a service that is close to those who are administered."

<sup>4</sup> See, for example, the scheme used by EASA, the European Advertising Standards Alliance, <http://www.easa-alliance.org/home.html> and <http://www.ftc.gov/bcp/icpw/comments/easaresponse.htm>

<sup>5</sup> See, for example, Recitals 21 to 23 and Articles 12 and 12a of the amended proposal for a European Parliament and Council Directive concerning the Distance Marketing of Consumer Financial Services and Amending Directives 97/7/EC and 98/27/EC of 23/07/99, document COM(1999)385 final.

<sup>6</sup> EU European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council directive on Certain Legal Aspects of Information Society services, in Particular Electronic Commerce, in the Internal Market (14263/1/1999-C5-0099/2000-1998/0325(COD)), Brussels, 28/02/00, 'Directive on Electronic Commerce'.

<sup>7</sup> European Parliament, Resolution on the draft action plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, document 13844/98 – C4/0692/98 – 98/0923(CNS) A4-0133/99, minutes of 13/04/99.

<sup>8</sup> For a list of such bodies see [http://www.uni-kiel.de/zivilrecht/roth\\_engl\\_links.htm](http://www.uni-kiel.de/zivilrecht/roth_engl_links.htm)

<sup>9</sup> For a list of such organisations see [http://www.europa.eu.int/comm/dg24/policy/developments/acce\\_just/acce\\_just04\\_en.html](http://www.europa.eu.int/comm/dg24/policy/developments/acce_just/acce_just04_en.html)

<sup>10</sup> For a list of such organisations see our website <http://dsa-isis.jrc.it/ADR>

<sup>11</sup> Article 2 of the EC Treaty defining the tasks of the Community and Article 5 of the Treaty establishing the principle of subsidiarity.

<sup>12</sup> See for example Communication from the Commission of 30/03/98 on the Out-of-court Settlement of Consumer Disputes, No. 1, <http://www.europa.eu.int/scadplus/leg/en/lvb/132031.htm>

<sup>13</sup> Christian BÜHRING-UHLE: "Arbitration and Mediation in International Business", Kluwer, The Hague 1996 at 276-277 with reference to African, American and Asian cultures.

<sup>14</sup> EU Directive 98/48/EC of 20/07/98 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. L 217/18 of 05/08/98, ([http://www.europa.eu.int/eur-lex/en/lif/dat/1998/en\\_398L0048.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1998/en_398L0048.html)).

<sup>15</sup> EU Directive 89/552 'television without frontiers', as amended by EU Directive 97/36, see EU O.J. L 298/23 1989 and L 202/60 of 1997.

<sup>16</sup> EU Directive 98/48/EC of 20/07/98 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. L 217/18 of 05/08/98, ([http://www.europa.eu.int/eur-lex/en/lif/dat/1998/en\\_398L0048.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1998/en_398L0048.html)).

<sup>17</sup> See the judgement Bond van Adverteerders, European Court of Justice, case C-352/85, 1987/2085.

<sup>18</sup> With this regard the Commission mentions in the reasons such services which are without charges for the user, "because its financing is made mostly via commercial communications ..." (at 16 et seq.); see also the European Court of Justice of 12/12/1996, case 320/94, 'Reti Televisive', 1996/I-6471.

<sup>19</sup> See Recital 18 of the Directive.

<sup>20</sup> See with regard to private home pages at Geocities ([www.geocities.com](http://www.geocities.com)) of the online servers amongst others T-online, AOL and others (according to the pattern of 'Peter's Homepage').

<sup>21</sup> In this sense HOEREN: "Vorschlag für eine Richtlinie über E-Commerce", Multimedia-Recht 1999/193.

<sup>22</sup> Green Paper on the convergence of the telecommunications, media and information technology sectors, document COM(97) 623 final, Economic and Social Committee, Opinion, O.J. C 214 of 10/07/98.

<sup>23</sup> Opinion of the Economic and Social Committee of 15/04/99, No. 4.1.1., on the 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market', O.J. C 169/36 of 16/06/99.

<sup>24</sup> EU Directive 89/552 'television without frontiers', as amended by EU Directive 97/36, see EU O.J. L 298/23 1989 and L 202/60 of 1997.

<sup>25</sup> Bernd SCHAUER: "E-commerce in der Europäischen Union", Manz, Vienna 1999 at 180, 181.

<sup>26</sup> EU Directive 89/552 'television without frontiers', as amended by EU Directive 97/36, see EU O.J. L 298/23 1989 and L 202/60 of 1997.

<sup>27</sup> See Article 1 of the Directive EU Directive 89/552 'television without frontiers, as amended by EU Directive 97/36, see EU O.J. L 298/23 1989 and L 202/60 of 1997.

<sup>28</sup> In this sense BRENN: "Der elektronische Geschäftsverkehr", ÖJZ (Österreichische Juristenzeitung?) 1999/483; see also MAENNEL: "Elektronischer Geschäftsverkehr ohne Grenzen – der Richtlinienvorschlag der Europäischen Kommission", Multimedia-Recht 1999/188.

<sup>29</sup> Bernd SCHAUER: "E-commerce in der Europäischen Union", Manz, Vienna 1999 at 183.

<sup>30</sup> See Annex V of EU Directive 98/48/EC of 20/07/98 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. L 217/18 of 05/08/98 ([http://www.europa.eu.int/eur-lex/en/lif/dat/1998/en\\_398L0048.html](http://www.europa.eu.int/eur-lex/en/lif/dat/1998/en_398L0048.html))

<sup>31</sup> Recital 19 of the Directive, last sentence.

<sup>32</sup> Elissavet N. KAPNOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 35.

<sup>33</sup> According to Article 13 of the Brussels Convention a consumer is a person who has concluded a contract for a purpose which can be regarded as being outside his trade or profession, if it concerned a contract for the sale of goods on instalment credit terms or a contract for a loan repayable by instalments, or any other form of credit, made to finance the sale of goods; or any other contract for the supply of goods or a contract for the supply of services, and if, (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and (b) the consumer took in that State the steps necessary for the conclusion of the contract. Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

<sup>34</sup> Article 5 the Rome Convention concerns certain consumer contracts. According to subsection (1) the provision is applicable to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object. Subsection (2) establishes that, in principle, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or - if the other party or his agent received the consumer's order in that country, or - if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy. In the absence of a choice of law, in principle, a contract to which this Article applies will be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

<sup>35</sup> See EU O.J. C 92/1 of 25/04/75.

<sup>36</sup> EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.

<sup>37</sup> EU Directive 87/102/EEC of 22/12/86 for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Consumer Credit, O.J. L 42 of 12/02/87, amended by Directive 98/7/EC of 16/02/98, O.J. L 101/17 of 01/04/98.

<sup>38</sup> EU Directive of 20/05/97 on the Protection of Consumers in Respect of Distance Contracts, O.J. L 144 of 04/06/97.

<sup>39</sup> EU Directive 99/44/EC of 25/05/99 on the Sale of Consumer Goods and Associated Guarantees, O.J. L 171 of 07/07/99.

<sup>40</sup> Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Consumer Credits, O.J. L 42 of 12/02/87.

<sup>41</sup> EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.

<sup>42</sup> EU Directive on the Protection of Consumers in Respect of Distance Contracts of 20/05/97, O.J. L 144 of 04/06/97.

<sup>43</sup> European Court of Justice of 14/03/91, Case C-361/89, 'di Pinto'.

<sup>44</sup> Elissavet N. KAPNOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 40.

<sup>45</sup> See for example Article ... of the Brussels Convention and Article ... of the Rome Convention.

<sup>46</sup> Henning BODEWIG: "Die neue europäische Richtlinie zum Fernabsatz", Deutsche Zeitschrift für Wirtschaftsrecht, 1997/447 at 449.

<sup>47</sup> Jan Geert MEENTS: "Verbraucherschutz bei Rechtsgeschäften im Internet", Otto Schmidt, Cologne 1998 at 180.

<sup>48</sup> European Court of Justice of 21/06/78, case 150/77, Bertand/Ott.

<sup>49</sup> Article 5 of the Rome Convention of 1980.

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- <sup>50</sup> EUROPEAN CONSUMER LAW GROUP: "Jurisdiction and Applicable Law in Cross-Border Consumer Complaints", *Journal of Consumers Policy*, Kluwer Acad. Publ., 1998/315-337 at 320.
- <sup>51</sup> See EUROPEAN CONSUMER LAW GROUP: "Jurisdiction and Applicable Law in Cross-Border Consumer Complaints", *Journal of Consumers Policy*, Kluwer Acad. Publ., 1998/315-337 at 321.
- <sup>52</sup> See EUROPEAN CONSUMER LAW GROUP: "Jurisdiction and Applicable Law in Cross-Border Consumer Complaints", *Journal of Consumers Policy*, Kluwer Acad. Publ., 1998/315-337 at 321.
- <sup>53</sup> Norbert REICH: "EG-Richtlinien und Internationales Privatrecht", in: *L'Européanisation du Droit International Privé*, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 109-126 at 119.
- <sup>54</sup> EUROPEAN CONSUMER LAW GROUP: "Jurisdiction and Applicable Law in Cross-Border Consumer Complaints", *Journal of Consumers Policy*, Kluwer Acad. Publ., 1998/315-337 at 321.
- <sup>55</sup> EUROPEAN CONSUMER LAW GROUP: "Jurisdiction and Applicable Law in Cross-Border Consumer Complaints", *Journal of Consumers Policy*, Kluwer Acad. Publ., 1998/315-337 at 319.
- <sup>56</sup> The Swedish Ombudsman: Consumers and Information Technology - a study on computers, electronic commerce and advertising on the Internet from the Committee Concerning Consumers Rights in the Information Society, Summary 1999:106 at 3, (<http://www.konsumentverket.se/summary.htm>).
- <sup>57</sup> Elissavet N. KAPONOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 40.
- <sup>58</sup> Hans-W. MICKLISCH, Bettina MONAZZAHIAN and Christina RÖSSLER: "Door-to-Door Selling - Pyramid Selling – Multilevel-Marketing", final report, volume I: Outline of a Possible Approach to Regulation, November 1999, at 10, see [http://www.europa.eu.int/comm/dg24/library/surveys/sur10\\_02.pdf](http://www.europa.eu.int/comm/dg24/library/surveys/sur10_02.pdf)
- <sup>59</sup> Assafa ENDESHAW: "Consumer Protection in Cyberspace: Back to Caveat Emptor?", *Consumer Law Journal* 1999/157-175 at 159.
- <sup>60</sup> The Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market', O.J. C 169/36 of 16/06/99.
- <sup>61</sup> European Parliament, Committee on Legal Affairs and the Internal Market, Draft Report on the proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (COM(1999) 348 final / C5/0169/1999/99/0154(CNS)).