

# EUROPEAN COMMISSION SERVICES' RESPONSES TO TACD'S APRIL 1999 RECOMMENDATIONS ON ELECTRONIC COMMERCE

## RECOMMENDATIONS ON ELECTRONIC COMMERCE

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## Consumer Protection in Electronic Commerce

### TACD RECOMMENDATION

Consumers must have effective consumer protections when shopping on the Internet. Advertisements should be truthful and provide complete information necessary to make an informed choice. Purchase decisions should be deliberate and documented. Products and services should be required to be as represented. Payment should be secure and consumers' risk of financial loss limited. If anything goes wrong, consumers should have recourse and opportunity for redress. The goals for a consumer protection framework in global electronic commerce should be to foster justified consumer confidence, fair competition, and economic development around the world. Consumers expect at least the same level of protections in the virtual marketplace as they currently have in the real marketplace.

### Resolved:

The EU and the US should support the establishment of minimum standards in electronic commerce, including the simplification of contracts, means for cancellation, effective complaint mechanisms, limits on consumer liability, non-enforceability of unreasonable contract provisions, recourse at least to the laws and courts of their home country, and co-operation among governments in support of legal redress. Such minimal standards should provide a functional equivalence to current safeguards offering at least the same levels of protection that would be afforded in the off-line world.

### EUROPEAN COMMISSION SERVICES' RESPONSE

The European Commission notes the concerns expressed by the TACD and agrees that support should be given for the establishment of minimum consumer protection standards in electronic commerce. We believe that for business-to-consumer electronic commerce to develop its full potential, a concerted effort must be made to enhance consumer confidence. It is unlikely that a single party or factor will determine the level of consumer confidence. Such confidence is more likely to rest on a combination of factors including consumer education and awareness, good marketing and business practices, transparency measures, codes of conduct, self-regulatory initiatives, including effective out-of-court dispute-settlement and arbitration schemes, and government regulation.

On the specific issues covered by the Resolution, the European Commission services would like to make reference to the existing framework of regulation that is in place at the EU level. This in general terms aims at the establishment of minimum standards and covers in

particular:

Means of cancellation, as foreseen in Directive 85/577/EC on contracts negotiated away from business premises, Directive 94/47/EC on purchase of the right to use immovable property on a time-share basis, Directive 97/7/EC on distance selling and the proposal for Directive on distance marketing of consumer financial services (Com(98) 468 final).

Effective complaint mechanisms, as foreseen or referred to inter alia in Directive 97/7/EC on distance selling, Commission Recommendation 98/257/EC on the principles applicable for bodies responsible for the out-of-court settlement of consumer disputes and the proposal for Directive on certain legal aspects of electronic commerce in the internal market (Com(98)586 final).

Limits on consumer liability as recommended in Commission Recommendation 97/489 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder.

Non-enforceability of unreasonable contract provisions as foreseen by Directive 93/13/EC on unfair terms in consumer contracts.

In respect of jurisdictional issues, the European Commission hopes for a successful outcome of The Hague Conference aiming at drafting a global convention on jurisdiction and the enforcement of judgements in civil and commercial matters.

The European Commission services take note of the recommendation on the need to simplify contracts and co-operation among governments in support of legal redress, and observes that to a certain degree these issues are addressed in the context of specific measures.

Governments around the world are faced with the dilemma that while the law operates on a territorial basis, electronic commerce and the Internet operate on a global basis. As indicated in its Communication COM/98/50 on "Globalisation and the Information Society", it is against this background that the European Commission attaches priority to international co-operation and co-ordination both in private sector (e.g. Global Business Dialogue on electronic commerce) and inter-governmental fora and between governments and stakeholders.

With regard to the specific issues referred to above, the European Commission is committed to meeting the deadline set by the OECD Ministers at the Ottawa in October 1998 to agree guidelines for effective consumer protection in electronic commerce among OECD countries by the end of 1999. The European Commission welcomes the input of the business and consumer communities in this respect. The TACD may wish to take note of a similar commitment on the part of the EU Member States as set out in the Council Resolution of 19 January 1999 on the Consumer Dimension of the Information Society.

The European Commission services observe that they are currently engaged in examining existing consumer-related legislation in the new circumstances arising from electronic commerce, to identify possible loopholes in this legislation concerning specific problems in the context of the information society and to identify possible areas where additional measures may be required.

The European Commission services would also like to refer the TACD to the comments they submitted to the US Federal Trade Commission in the context of its workshop in consumer protection in the global electronic marketplace<sup>1</sup>. As the EU Member States have done in their Council Resolution on the Consumer Dimension of the Information Society, the European Commission emphasises that consumers making use of electronic commerce should not be less well protected than they are when using traditional forms of commerce and that the level of protection afforded in electronic commerce must, in its effect, be equivalent to the level of protection afforded in off-line commerce.

The European Commission services invite the TACD to elaborate further on its Resolution and would welcome practical suggestions on how the issues could be addressed and what the core characteristics are that should feature in the requested standards. The European

Commission services encourage the TACD to analyse the European Union's policy initiatives and present further recommendations and suggestions as appropriate. The European Commission services would welcome any initiatives the TACD and its members may take to work with the business community with a view to establish a better mutual understanding and common recommendations.

## Safe Harbour Proposal and International Convention on Privacy Protection

### TACD RECOMMENDATION

The Safe Harbour proposal now under consideration by the United States and the European Union fails to provide adequate privacy protection for consumers in the United States and Europe. It lacks an effective means of enforcement and redress for privacy violations. It places unreasonable burdens on consumers and unfairly requires European citizens to sacrifice their legal right to pursue privacy complaints through their national authorities. The proposal also fails to ensure that individual consumers will be able to access personal information obtained by businesses.

Therefore,

1. The TACD urges the European Commission and the Ministers of the European Council to reject the Safe Harbour proposal. The proposal will undermine the purpose of the EU Data Directive and compromise the privacy interests of European citizens.
2. The TACD recommends the development and adoption of an International Convention on Privacy Protection that will help safeguard the privacy interests of consumers and citizens in the twenty-first century.
3. The TACD further urges national governments to ensure that consumer organisations are given a more central role in the future development of international privacy policies and practices that affect consumer interests.

### EUROPEAN COMMISSION SERVICES' RESPONSE

1. The TACD urges the European Commission and the Council to "reject" the Safe Harbour proposal. The European Commission services attach the greatest importance to the protection of individuals with regard to the processing of personal data and ("privacy interests") and privacy and consider that the best way to serve these interests is persuading the US side to improve their proposal, rather than "rejecting" it. The TACD assessment is based on a version of the "Safe Harbour Principles" which is being significantly improved as a result of the EU-US dialogue on Data Protection. The two sides plan to finalise these discussions in the Autumn. The results will be submitted to both the Data protection Authorities (the Art. 29 Working Party) and the Member States. Due to the evolving nature of this exercise, drawing conclusions at this stage would be premature.

2. The TACD "recommends the development and adoption of an International Convention on Privacy Protection that will help safeguard the privacy interests of consumers and citizens in the twenty-first century". The European Commission services share entirely this objective. The OECD Guidelines of 1980 prove that building consensus on the basic privacy principles is possible and other International Instruments (e.g.: Article XIV of the GATS, European Convention on Human Rights) confirm that Privacy and Data protection are regarded as a fundamental right. However, reaching an agreement on a legally binding and enforceable instrument, such as an International Convention is likely to take a long time. This objective at the multilateral level, which may be proposed in the framework of the WTO, does not exclude (and would indeed be facilitated by) the achievements that are deliverable in the shorter term via the EU-US dialogue. It should be further noted that the European Commission's Communication on "Globalisation and the Information Society: the need for strengthened international coordination" COM/98/50 recommends developing an "International Charter" on global electronic commerce issues, such as the protection of personal data.

## Children and Electronic Commerce

### TACD RECOMMENDATION

Electronic commerce will have an enormous impact on children's lives. The Internet will provide children with many new opportunities for learning, civic engagement, community building, and new forms of creativity. New forms of electronic media may also have potentially negative effects on children's lives. For example, the Internet, Digital Television, and other forms of electronic media allow for the "one-to-one" targeted marketing.

Children, particularly younger children, are more vulnerable to advertising and commercial messages. Small children also have difficulties distinguishing between advertising and programming. Other studies suggest negative effects of food, alcohol and tobacco advertising to children on public health. Further, many parents and consumer groups are concerned with the impact of advertising on the development of children's values, particularly materialism.

Resolved:

Children must be able to take advantage of the benefits of new digital media in a safe environment. TACD recommends that appropriate safeguards are put in place by governments of the US and EU based upon the following principles.

1. Data collectors should not collect personal information from children unless it is relevant, necessary and lawful.
2. Parents should be involved when data are collected from young children. Therefore, data collectors must be required to obtain parental consent prior to data collection from young children.
3. Advertising and promotions targeted at children should be clearly identifiable as such and separated from content.
4. There should be limitations on advertising to children, for example with regard to the products or the manner in which they are sold or promoted. Business should not take advantage of children's credulity and lack of experience.
5. Every child should have affordable access to high quality educational and cultural information and services. There should be non-commercial spaces and electronic commons akin to public playgrounds, where children can safely explore, play, create, learn, and participate in civic life.

### EUROPEAN COMMISSION RESPONSE

The European Commission services support the five principles on which the TACD Recommendation on "Children and Electronic Commerce" adopted in Brussels last 23-24 April 1999, is based.

On 23 October 1996 the European Commission adopted a Communication<sup>2</sup> on illegal and harmful content on the Internet and a Green Paper on the protection of minors and human dignity in audiovisual and information services. Both documents advocate closer co-operation between the EU Member States and on an international level, the use of filtering software and rating systems, and an encouragement to self-regulation of access providers. On 25 January 1999 the European Parliament and the Council adopted a multi-annual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks.

European Community provisions have already been adopted for the protection of minors in

the field of television programmes (Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities<sup>3</sup>). In September 1998, the European Community went further with the adoption of a Recommendation on the protection of minors and human dignity in audio-visual and on-line services.<sup>4</sup> The Recommendation invites the parties concerned to draw up codes of conduct and lays down guidelines for these, with the aim, inter alia, of restricting access by minors to content which may impair their physical, mental or moral development. As far as the subject "Children and Electronic Commerce" is concerned, the European Commission wishes to further explore any potential problems and verify whether there is a need to take legislative or voluntary measures; the European Commission has launched a number of initiatives on this issue including organising a dialogue between representatives of the industry and of the consumer organisations.

Such a dialogue could lead to the adoption of a Code of Conduct, similar to that concluded with the consumers' organisations on the Euro.

The European Commission would consider, following the outcome of this dialogue, whether it was necessary to propose other measures.

Therefore, both the industry and the consumers' organisations, have been contacted in order to know their views about the European Commission's plans as well as about the subjects they want to be included in the dialogue.

Concerning the consumers' side, the discussion is being held within the Consumers' Committee, an advisory council supported by DG XXIV, in which the European Consumers' Organisations are represented.

On the industry side, the contacts include the European Advertising Tripartite, the European Alliance for Ethics in Advertising, and the World Federation of Advertisers. The European Commission expects that the first conclusions of the dialogue can be reached within 1999.

In addition, the European Commission recently published a Call for tender<sup>5</sup> to carry out a study on advertising and teleshopping to children to cover all media throughout the European Union and the European Economic Area States.

The study will consider specifically the issues raised by the identification of advertising/teleshopping, provisions concerning violence, provisions relating to social and ethical values, provisions relating to safety, and provisions relating to the presentation (i.e. Truthfulness, clear indication of price etc.). The study is expected to be completed within six months following the award of the study contract, and will be of major importance in respect of any regulatory or voluntary initiatives to be taken in respect of this issue.

Minimum disclosure standards for suppliers in electronic commerce transactions

#### TACD RECOMMENDATION

The EU and the US should determine the necessary minimum of information that businesses have to provide to achieve sufficient market transparency in electronic transactions. For transaction involving the purchase of goods and services over the Internet, consideration should be given to the following items:

[Editors note: This is not a resolution on the issue of jurisdiction, and takes no position on what jurisdiction should be. However, the resolution does address the relevant information about jurisdiction that sellers must disclose to consumers].

1. Information on the supplier

From the consumer's point of view it's necessary to know who the partner of the contract is and where the supplier is located. According to the national laws in many countries it is often necessary to publish the name of a person who is allowed to represent the company. In some countries this is a necessary pre-condition to file claims in legal proceedings. Apart from this specific problem the following details about the supplier are important:

- i) name of the company
- ii) geographic address of the company
- iii) phone, fax and e-mail numbers of the company
- iv) any relevant registration or license number and the name and address of the body by which the business is registered or authorised.

## 2. Information on the offer

To make the use of electronic offers as convenient as possible and to provide consumers a basis for purchase decisions, they must know, at least, the following:

- i) geographic targeting, length and validity of the offer
- ii) price and currency of the purchase including all relevant costs, including, for example, such items as actual costs of delivery, postage and handling, insurance and customer taxes and duties
- iii) any safety or care warnings required by relevant national laws as well as instructions for proper use, where necessary
- iv) for offers targeted to other than the suppliers' home country, additional duties and taxes or an easy accessible source where the consumer can get these information.

## 3. Information on the terms and conditions

Before buying consumers should be informed about the terms and conditions of the transaction, including such items as:

- i) the main characteristics of the goods or services,
- ii) terms of payment including a clear description of the procedure,
- iii) information on the liability of the supplier for fraudulent use of consumers' personal data provided by them online
- iv) terms of delivery including the time period of delivery
- v) guarantees, warranties or other provisions relating to after-sales service
- vi) details of any cooling-off period
- vii) information on the complaint procedure
- viii) conditions related to return, exchange, cancellation, refund policy.
- ix) privacy policy

## 4. Information on the applicable law and jurisdiction

For cases of any dispute related to the contract the consumers must be informed about the applicable law and jurisdiction and procedures for redress.

## 5. Information after placing an order

Confirmation concerning the details of an order should contain such items as:

- i) the date and the number of the order
- ii) the shipping address
- iii) the number of items and name of the product
- iv) the price the consumer has to pay as a whole.

## EUROPEAN COMMISSION SERVICES' RESPONSE

The European Commission services welcome the TACD Recommendation on minimum

disclosure standards for suppliers in electronic commerce transactions and are encouraged to find in it strong support for the policy they have been pursuing with regard to market transparency and information in general and electronic commerce specifically. Community legislation and proposals already cover many of the information elements referred to in the Recommendation for legislation.

With regard to general information such as the identity of the seller, information on the terms and conditions and information after placing the order this is addressed by generally applicable measures such as Directive 97/7/EC on distance selling, Directive 98/6/EC on the indication of the prices of products offered to consumers or the proposal for Directive on certain legal aspects of electronic commerce in the Internal Market.

With regard to specific information on for example the offer and the terms and conditions this is approached in a range of sector specific measures governing product or service categories such as for example financial services.

As electronic commerce allows consumers to transact directly with businesses in other countries, there is obvious value in international co-ordination and co-operation to avoid that businesses will be confronted with disclosure requirements and consumer expectations with which they are unfamiliar and to ensure that consumers receive the information they expect and rely on to make informed decisions.

The European Commission services see a close link between the TACD Recommendation and the ongoing OECD discussion with a view to agree on guidelines on consumer protection in electronic commerce. Within this context the European Union Member States and the European Commission are endeavouring for clear guidelines to governments, business and consumers as to the meaning of full and fair disclosure of information.

The European Commission services note that the concept of full and fair disclosure is a dynamic one and that the value and usefulness of information should be assessed under the circumstances. It is against this background that we are of the opinion that certain elements of information have an absolute value and should always be provided, whereas others should be provided where this is useful and relevant under the circumstances.

On the issue of information on applicable law and jurisdiction, the European Commission services draw the attention of the TACD that this kind of information could be misleading to the consumers. In fact, applicable law and competent jurisdiction are determined by legal rules of each country, which are not harmonised at international level. The business could thus only indicate to the consumer what law it would like to be applicable and what courts it would like to be competent, but the lawfulness of this choice would always be submitted to review of any judge of any country to whom the dispute would be submitted.

The European Commission services encourage the TACD and its members to monitor the ongoing OECD discussions and to continue to provide input where it is felt that the expectations of the consumer community are not being met. In this respect the European Commission services would like to also encourage the TACD and its members to continue to pursue efforts to come to an understanding with the business community as to what information elements should be given as well as the way in which they should be presented.

## Unfair Contracts

### TACD RECOMMENDATION

Disputes over jurisdiction in cyberspace have led to increased interest in the role of contracts to define rights in transactions involving sellers and consumers. However, policy makers should be wary of measures that permit sellers to enforce unreasonable contract terms. Various "click on" type contracts used in web pages today are often one-sided measures that unfairly would limit consumer rights in a wide range of areas, including the rights to benefit from exceptions and limitations of copyright, the right to criticise products, the right to offer

competing products, the right to seek redress for defective products or service, and many other important consumer rights.

#### EUROPEAN COMMISSION SERVICES' RESPONSE

The European Commission services invite the TACD to refer to their response to the Recommendation on Consumer Protection in Electronic Commerce, particularly where it refers to Non-enforceability of unreasonable contract provisions as foreseen by Directive 93/13/EC on unfair terms in consumer contracts.

#### Anticompetitive Practices

#### TACD RECOMMENDATION

In the area of data networks, it is essential that policy makers protect consumers against monopolistic and anticompetitive practices. Increasing returns and network effects lead to problems when dominant firms use market power to exclude rivals or limit the ability of rivals to develop products that are interoperable. Practices of bundling products, technological tying of products, or other techniques can reduce competition and lead to high prices, reduced consumer choice or lower quality. There are particular concerns for those elements of networks that provide user interfaces for consumers, including default menus for electronic commerce and selection of editorial content. Policy makers should use appropriate competition policy and regulatory remedies to ensure that consumers have open platforms for network access, and that private control over network bottlenecks are not used to exercise control over essential network navigation tools or content.

#### EUROPEAN COMMISSION SERVICES' RESPONSE

The European Commission services agree with the objective of preventing anticompetitive practices regarding electronic commerce.

While it may be true that certain aspects of Internet trading are subject to economies of scale of demand, it is nevertheless only where price distortion is deemed to be occurring that competition law at European level is generally applicable.

Such price distortion could, indeed, result from practices such as unwarranted bundling of products or technological "lock-in".

Clearly consumers will benefit from the judicious application of competition law and sectoral regulation aimed at preventing abuse of dominant party ownership of network bottlenecks. Whether the essential facilities doctrine could be applied in such cases remains to be seen.

When promoting electronic commerce throughout Europe's industrial sectors the European Commission places emphasis on the online marketplace to be as open and competitive as the offline marketplace. Europe's industry has a strong tradition in sectoral consensus building and networking. To this end, and in addition to the safeguard provided by European Community competition rules, the European Commission services will invite comments on the preparation of guidelines on how to establish industrial consensus -by consortia, for instance- in sectors whilst keeping the market open.

The European Commission has started to analyse the role of open standards and common interfaces in the network economy. For this purpose, a study on the role of standards in the network economy has been finalised. It will be widely discussed in the second half of 1999 in order to collect comments on its findings and recommendations such as the establishment of guidance documents in this domain.

#### Intellectual property and electronic commerce

The Internet and new information technologies present a number of complex issues regarding

intellectual property rights. Authors and creators have an interest in protecting unauthorised commercial exploitation of their own works, but also in obtaining access to the works of others. Firms that sell computing equipment and software may seek protection for those works, but also may need the right to reverse engineer or develop products that are interoperable with works owned by others. Citizens benefit from the economic incentives of copyright laws, but also from fair ("innocent") use exemptions in several national copyright systems. The free flow of information is essential for a variety of purposes, including the exercise of free speech and the ability of innovate and create. Education use presents special issues, including those involved in distance learning.

For these reasons, governments in the US and the EU should embrace an intellectual property framework that includes the following elements:

1. Distance Education.

Mechanisms to protect copyrighted works on the Internet should not unduly restrict the ability of educators to share information with students in ways that are equivalent to current practices involving more conventional teaching methods.

2. Privacy.

There are important conflicts between privacy and certain technologies that protect copyrighted materials. Privacy is a social good. Society should avoid mechanisms to protect copyright that are unreasonable intrusions on personal privacy, particularly when less intrusive mechanisms are technologically feasible.

3. Copyright exceptions.

Governments should provide copyright exceptions that address such issues as fair or innocent use, private copying, library uses, research and private study, and exceptions that are essential for reverse engineering and other techniques needed for the development of interoperable products. Consumer rights in the digital world should not be less than traditional rights in older publishing and other information technologies. Consumer rights for fair uses of copyrighted materials should not be alienated by coercive or unfair contracts. Legislation to implement WIPO treaties should address these concerns.

4. TRIPS Article 13.

Governments should ask the WTO to expand Article 13 of the TRIPS regarding exceptions to copyrights. The language is currently too narrow, and does not even include the language in Article 30 concerning patents, that permits governments to consider the legitimate interests of third parties.

5. Public Domain and non-commercial software.

The public domain and non-commercial software plays an important role in public and commercial life. The Internet is built upon public and open protocols and uses a wide range of free software programs. Free software operating systems such as Linux and xBSD are important alternatives to more monopolistic server technologies. Databases of government information provide an important new foundation for civic democracy in the information society.

6. Database rights.

National legislation to protect investments in databases should avoid overly broad protections, creating rights in facts, or rights that lead to anticompetitive or monopolistic acts.

7. Business Practice Patents.

The US and EU governments should ask competition authorities to solicit public comments and hold public hearings on the policy issues associated with issuing patents on business practices, including those associated with electronic commerce, to determine if these patents are needed, or if they are unnecessary, anticompetitive and socially wasteful.

8. Parallel Imports.

Electronic commerce raises profound and fundamental challenges to national policies that

seek to restrict parallel imports of goods. Government should provide for international exhaustion of rights for copyrights, patents and trademarks, as is permitted under Article 6 of the WTO/TRIPS agreement, so that consumers can benefit from the free flow of goods. Governments can require that goods be labelled or identified as parallel imports, if such requirements benefit consumers and do not present unreasonable restrictions on trade in parallel goods.

## Appendix

### TRIPS Articles 6, 13 and 30

#### Article 6 Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

#### Article 13 Limitations and Exceptions (copyright)

Members shall confine limitations or exceptions to exclusive rights to certain special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

#### Article 30 Exceptions to Rights Conferred (patents)

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

## EUROPEAN COMMISSION SERVICES' RESPONSE

The European Commission services take note of the Recommendations made by the TACD on matters relating to the protection of intellectual property rights in the framework of electronic commerce. The emerging Information Society will bring new challenges to the protection of intellectual property rights. A number of these challenges resulting from the digital environment have already been addressed in two international treaties adopted in December 1996 under the auspices of the World Intellectual Property Organisation (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). They represent a major step forward in providing for adequate protection of authors, performers and phonogram producers in the digital environment. The Draft Directive on Copyright and Related Rights in the Information Society<sup>6</sup> plays a crucial role in this context. The aim of this proposal is to adjust and complement the existing EU framework on copyright and related rights to provide for a Community-wide level playing field in the digital environment, which ensures public acceptance of the new services and fosters creativity and investment in them. At the same time, the draft Directive serves to implement the main obligations of the two WIPO treaties signed by the European Community and Member States in the course of 1997. The European Community and the Member States are currently in the process of ratifying and implementing these treaties. Citizens will benefit from a harmonised legal framework on copyright and related rights, including appropriate exceptions to these rights, as well as the conditions of their application. Such a harmonisation is crucial in order to facilitate cross-border exploitation of copyright protected goods and services, including their dissemination to users. The TABD has already stressed the need for swift ratification and implementation of the two treaties by

the U.S., the EU and other third countries.

The TRIPs Council has just begun to look into matters related to the impact of electronic commerce on the protection of intellectual property rights. Further discussions will be held in the near future to examine the current provisions of the TRIPs Agreement and the possible need to adapt them to the new developments.

On the general introduction to the Recommendations, it should be noted that authors and related right holders have an interest not only to receive protection against commercial exploitation of their works and other subject matter, but also against their illegal exploitation by private users. Access to works is, naturally, facilitated through publication. As regards reverse engineering, Article 6 Council Directive No. 91/250/EEC on the Legal Protection of Computer Programs already provides for this facility in order to achieve the interoperability of computer programs with other programs.

The need for limitations and exceptions to copyright and related rights for certain uses, such as for educational use (Recommendation No. 1), private copying, library use and research (Recommendation No. 3) has always been recognised, in the international conventions as well as in the EC "acquis communautaire" on copyright and related rights, including proposed legislation which explicitly allows for exceptions for specific uses. However, the economic impact of any such exception in the new technological environment may be different compared to the traditional environment. The scope of certain exceptions may therefore need to be re-assessed in the light of the new environment, in order to avoid economic damage to the market of protected works and other subject matter.

In general, conflicts between privacy and copyright protection should not arise (Recommendation No. 2). As far as personal data are concerned, Directive No. 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, also applies to the area of copyright and related rights, thereby ensuring adequate mechanisms to respect privacy.

Article 13 of TRIPs Agreement (Recommendation No. 4) provides for the possibility to allow limitations and exceptions to copyright and related rights based on the corresponding Article 9, paragraph 2 of Berne Convention. Given the different nature of industrial property, the corresponding provisions in the patent area (Article 30 of TRIPs Agreement) also requires account to be taken of the "legitimate interests of third parties".

The creation of works, notably software, often requires considerable creativity and deployment of skill and labour (Recommendation No. 5). Authors are vested with intellectual property rights. It is, therefore, up to the author to decide if and when to allow third parties to use his works against the payment of a fee or not. While it is true that public domain and non-commercial software play an important role in public and commercial life, this must not undermine the author's legitimate interest in receiving adequate compensation for exploitation of his property.

On the protection of databases (Recommendation No. 6), Directive No. 96/9/EC on the Legal Protection of Databases allows Member States to provide for a number of exceptions to the rights of authors and makers of databases conferred under the Directive, including for private purposes, teaching and scientific research, etc. It, therefore, strikes a careful balance between the interests of authors and makers of databases and of users. With regard to possible anti-competitive practices in the area of databases, it has to be recalled that the exercise of intellectual property rights is subject to the provisions of competition law. Moreover, the Directive provides for rights in databases or in substantial parts of databases, but not in facts.

With regard to patents on so-called "business practice patents" (Recommendation No. 7), currently Article 52 of the European Patent Convention excludes from the scope of patentable inventions "schemes, rules and methods...for doing business". Therefore, the request by the TACD to solicit public comments and hold public hearings in this respect would not be of any additional value at the moment.

The question of parallel imports, i.e. the exhaustion of exclusive rights (Recommendation No. 8), remains very sensitive. The TRIPs Agreement leaves it up to the WTO Members whether or not to allow parallel importation. The European Commission has commissioned, in the area of trademarks, a study on the impact of parallel imports which was discussed with the interested parties in April 1999. The European Commission is currently evaluating the outcome of the study and the comments received in order to review the current system of regional exhaustion in the Community. In this respect it has to be noted that the TABD expressed its opposition to the international exhaustion of intellectual property rights.

## Global Institutions and Consumer Protection

### TACD RECOMMENDATION

The TACD Working Group on Electronic Commerce recommends that governments of the US and EU should:

1. Recognise that the creation of the WTO, the rise of electronic commerce and other aspects of the globalisation of commerce require citizens to confront difficult problems associated with the development of global norms and enforcement mechanisms for the protection of consumers.
2. Acknowledge that the WTO's role in consumer protection measures is currently a negative one, eliminating regulatory measures that are judged to be barriers to trade. In contrast, the WTO lifts global standards for the protection of intellectual property.
3. Begin a dialogue with consumer groups and governments on the issues related to the development or reform of international organisations that can or should play a role in elevating global consumer protection.
4. Consider and discuss the feasibility of proposals to create one or more permanent institutions that have as the central mission the protection of consumers in the global economy.

### EUROPEAN COMMISSION SERVICES' RESPONSE

The European Commission services have taken note of the proposal made by the TACD to create a global Consumer Protection Organisation. The European Commission has already been officially addressed a similar idea on 19-20 March 1999, on the occasion of the Forum "Political Institutions and Democracy in the Information Society".

It is evident that consumer policy is becoming increasingly important and that international organisations are increasingly tackling consumer issues. The work of these organisations should therefore be better co-ordinated.

The European Commission services find the idea of a World Consumer Organisation a novel one and will reflect further on it. However, it is premature to discuss in detail the possible role and structure of such organisation. It is clear that the creation of such a body would require international support.

In any event, it would not seem appropriate to limit the mandate of such a body to e-commerce related issues. The remit would be too narrow and would not cover a vast range of consumer concerns.

On the question of the WTO and the impact of e-commerce, the European Commission has on several occasions acknowledged that the appearance of new technologies and in particular the rise of electronic commerce, while creating new and interesting business and cultural opportunities for consumers, creates new and difficult challenges.

The market globalisation, while enlarging the choice for consumers and sometimes decreasing the prices of products, has some drawbacks, namely in terms of guaranteeing an adequate balance between market access and consumer protection.

It is clear that if the WTO is to continue to be respected as the international arbiter of trade disputes, it has to take consumer concerns into account in making its rulings.

The European Commission services are indeed always ready and willing to dialogue with the consumer representatives to analyse the best possible solution to take into account consumers' interests on the international scene. The European Commission has already offered to the European consumer associations a number of opportunities to express their views on this matter. The European Commission will continue to inform and brief the European consumer associations on the developments taking place in the WTO. Furthermore, the European Commission has created a WTO Working Group in the framework of its advisory body for consumer affairs, the Consumer Committee (CC). The WTO Working group of the CC is invited to express the consumers' concerns with respect to the general question of world trade liberalisation; more precisely, the group should identify specific issues of concern in view of the new "Millennium Round".

#### Participation in Policy Making

#### TACD RECOMMENDATION

EU and US negotiations on standards for the electronic marketplace should develop means for consulting consumers as an integral part of the negotiating process. TACD groups are encouraged to participate in the FTC workshops on consumer protection in global electronic marketplace in the US and to actively consult with European governments.

#### EUROPEAN COMMISSION SERVICES' RESPONSE

Technological development has created an Information Society, which is changing rapidly. Standards are being created both to regularise activities in specific areas and to provide consistency of product and operation. The inclusion of consumers into this process at all levels is to be encouraged if consumer requirements are adequately to be taken into account in the development of standards via their input before, during and at the end of the standards specification process.

The European Commission services take note of the message addressed to the TACD Members. The European Commission services agree with this idea and encourage the TACD Members to follow the Recommendation, while confirming their openness to the Dialogue.

1 Available on the Internet, at the following address:

[http://europa.eu.int/comm/dg24/policy/developments/e\\_comm/index\\_en.html](http://europa.eu.int/comm/dg24/policy/developments/e_comm/index_en.html)

2 COM(96)0487

3 See in particular Chapters IV and V (as amended) in respect of both advertising and programming.

4 Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity. (Official Journal L 270 of [07.10.1998](#), p.48).

5 Official Journal S 139 of [21.7.99](#)

6 Reference : COM(97)0628 - C4-0079/98-97/0359(COD)