



Global Business Dialogue on Electronic Commerce

The Paris Recommendations

September 13, 1999

Paris 1999 Recommendations

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GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



AUTHENTICATION AND SECURITY

SEPTEMBER 13, 1999

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Introduction

The GBDe believes that the principles of protection and promotion are of decisive importance for the development of authentication mechanisms and of security in electronic commerce:

Protection: It is important to promote trust in electronic commerce by protecting transactions against any unauthorized access or illegal attack. The private sector needs to offer electronic commerce services in a secure manner. Governments should provide the minimum necessary legal framework, such as ensuring equivalency between electronic authentication and traditional handwritten signatures and personal seals, and providing legal mechanisms to protect against misuse.

Promotion: It is also vital to promote the growth of an environment for the use of authentication and security in electronic commerce in which the players can enjoy the benefits of industry-led global development and a highly competitive open market. The private sector has developed and is implementing authentication and security infrastructures, and electronic commerce is already being conducted using this infrastructure. Governments should build on the achievements of business and provide globally-harmonized principles on authentication and security, by ensuring the free use of and trade in encryption products.

Recommendations

Recommendations to Governments on Electronic Authentication

Cooperation Between Governments for an International Framework

Many local, national, and regional initiatives have been developing licensing schemes, regulations and guidelines for authentication practices that could be barriers to global electronic commerce. Therefore, it is critical to promote international coordination between and within the private and public sectors to avoid conflicting policies and to establish a stable, but flexible framework. Such a framework should be technology-neutral, recognize the validity of contracts, and avoid premature solutions from region to region or nation to nation. The GBDe encourages decision-makers to cooperate on an international framework based on the following principles:

- harmonization of existing rules and minimal adoption of new rules;
- freedom of contract;
- user choice of appropriate technology or authentication mechanisms;
- neutrality of technology and implementation;
- non-discrimination - equal treatment to providers and users of similar services based on objective criteria;
- the presumption that all authentication technologies and business methods may be evidence of authenticity.

Legal Effect of Electronic Signatures, Freedom to Contract and Other Recommendations

Electronic signatures should have the same legal effect as a handwritten signature or a personal seal. Legislative action should be taken to attain this goal and thus provide users with the necessary legal security.

- Governments should adopt policies that continue to promote, or do not infringe upon, freedom of contract between parties regarding the use of authentication that users trust.
- Regulation, when necessary, should be technology-neutral in order not to hinder the development of new technologies.
- The private sector must be free to create and offer authentication services in a highly competitive environment without trade barriers.
- There must be a variety of authentication services available to meet users' needs, and users' freedom of choice should be guaranteed.
- There should be transparency of the level of authentication offered, and industry should be free to develop and market a variety of authentication levels to match the needs of the marketplace.
- Mechanisms must be created to ensure the cross-border legal validity of authentication products and services.

Recommendations to Private Sector on Electronic Authentication

Development of Authentication Systems and Services

Electronic authentication products and services are indispensable for secure electronic commerce. Consequently, the development of secure, trusted authentication systems and services will enhance the growth of electronic commerce and the confidence of users. The following principles are important in order to realize these objectives:

- Industry-developed, voluntary accreditation schemes may be helpful to ensure user confidence.
- Industry must develop, according to market needs, operational guidelines or voluntary consensus-based standards.
- Both international and domestic considerations should be taken into account by industry when establishing guidelines and standards.

Recommendations to Governments on Cryptography

Free Development and Use of Cryptography

Strong cryptography is essential to the security of the information society. Regulating its development, use, distribution or export endangers the privacy of individuals and the legitimate security requirements of businesses. Therefore, we strongly recommend the following:

- Removal of restrictions on the cross-border distribution of cryptography products and services;
- Users should be free to select the type and strength of encryption according to their needs without interference.
- There should be no indirect or direct mandates by political authorities for key recovery and trusted third party escrow features, and law enforcement access must be done only with the consent of the key owners or by court order.
- Governments should adopt and implement the specific principles in the OECD guidelines regarding user choice, industry-led, market-driven development of products, services and international standards that users trust.

Additions

Measures to Enhance Confidence in the Security of Electronic Commerce

Additionally, we think the realization of the following principles would provide strong additional incentives for the development of electronic commerce:

- Governments should use their procurement powers to further the growth of secure, market-driven authentication mechanisms.
- A Global Support System for emergency situations such as big earthquakes and terrorist attacks should be developed.
- Educational efforts for the public that emphasize the merits rather than the risks of Electronic Commerce should be undertaken.

GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



CONSUMER CONFIDENCE

SEPTEMBER 13, 1999

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Introduction

The GBDe believes that building consumer confidence is a key issue for the development of electronic commerce, and that both business and governments have a responsibility to foster it. This chapter examines a number of actions that can be taken by both business and government to build consumer confidence and to increase the willingness of consumers to engage in electronic commerce. Many of these issues are discussed in more detail, with the same conclusions, in other chapters, but are dealt with here as well, because of their particular importance for creating consumer confidence. Moreover, most of the recommendations are based on many individual or collective initiatives, already developed or in the process of being developed by business and business associations.

Recommendations

Trust and Transparency

Trust

Business will continue to develop codes of conduct covering areas of concern to consumers (including such topics as transparency and identification, data protection, security of transactions, authentication, commercial communications, distance selling, cancellation policies, and redress). These codes should also provide mechanisms for enforcement and monitoring/surveillance. Similarly, third party certification systems that provide “seals” and “trustmarks” to certify that vendors comply with a defined code of conduct and specified enforcement provisions should be developed through competition in the market and should be widely used by Internet vendors.

Governments should support the development of self-regulatory initiatives and permit competition among them, rather than favoring one over another or attempting to regulate the areas covered by such initiatives. Governments should highlight the variety and importance of available options.

Transparency

Businesses engaged in electronic commerce should build consumer confidence through the creation of adequate transparency. This could include the provision of comprehensive and accurate information about the site and the transaction, the identity of the merchant, the contact details, any authorization or certification scheme the business is subject to, and any codes of conduct it adheres to.

Governments should support the implementation of self-regulatory mechanisms by business to promote transparency to consumers as the best way to contribute to consumer confidence and awareness. As worldwide harmonization is unlikely to be achieved regarding transparency requirements, it would be counterproductive to pursue this goal through legislation. On the other hand, governments do have a role in ensuring a high degree of transparency regarding the conditions for using the Internet. To reduce costs for the consumer, governments should promote free and fair competition in the provision of Internet access services.

Unwelcome content¹

Business will continue to build consumer confidence through the further development of technologies which allow individual screening of the Internet, and through voluntary, self-regulatory codes allowing for respect of consumer choice on content. In particular, business should offer consumers marking or rating systems in line with their expectations.

Governments should undertake, sponsor and encourage education of the public with regard to the possibilities offered by screening and filtering technologies to protect consumers against unwelcome content.

Information and education

Industry associations should put a high priority on informing their members about electronic commerce and the need to build consumer confidence in electronic commerce. Individual businesses should promote consumer awareness about the positive potential of electronic commerce, and provide guidance on how best to complete transactions.

Governments and consumer groups should establish information and education centers for business and consumers regarding the use of the Internet for commercial transactions. Educational institutions should ensure that pupils learn to use the Internet.

Security and Privacy

Protection of personal data²

Business should adhere to the GBDe set of principles regarding the protection of and the access to personal data of consumers.

¹ See chapter on Content/Commercial Communications

² See chapter on Protection of Personal Data

Governments should actively support the various voluntary and self-regulatory initiatives currently being developed in the field, including the GBDe set of principles on data protection, and contribute to their international recognition.

Key escrow, encryption and payment systems³

Business should continue to respond to the need to offer electronic commerce services in a secure manner, for instance, by creating and using payment systems which offer the degree of security appropriate to the circumstances of the transaction. Business should keep in mind that the conditions of payment and reimbursement can also play an important role in enhancing consumer confidence in payment systems.

Governments should provide, harmonize, or recognize mutually the minimum necessary legal framework, such as the establishment of the legal effect of electronic signatures. They further should refrain from introducing restrictions on the use of and the trade in encryption technologies (including advanced technologies), nor promote key escrow systems either expressly or indirectly. Law enforcement access should only be permitted with the consent of the key owner or by court order.

Unsolicited commercial communications⁴

Business should continue to take this consumer concern seriously, and to develop guidelines or codes of conduct regarding unsolicited commercial communications. Business should also develop systems that enable consumers to express a desire what commercial communications they wish to receive (“opt-out”).

Governments should encourage voluntary self-regulatory initiatives in this field and ensure that existing or future regulations on unsolicited commercial communications are internationally-compatible.

Applicable Law and Choice of Forum⁵

Alternative dispute resolution mechanisms (ADR)

Business should cooperate with governments to provide consumers with efficient remedy mechanisms by increased use and legal recognition of alternative, simple, timely and inexpensive dispute resolution mechanisms through arbitration, mediation, and conciliation or self-regulation.

Governments should realize that nationally-applicable consumer protection laws do not fully provide consumer confidence. While eventual recourse to the court system must

³ See issue paper on Protection of Personal Data

⁴ See chapter on Content/Commercial Communications

⁵ See chapter on Jurisdiction

remain available, consumer's interests might be satisfied more appropriately by business-developed remedial mechanisms mentioned above. Hence, they should inform consumers about the availability and advantages of ADR mechanisms.

Applicable law

Business should provide consumers with accurate and easy-to-understand information related to the terms of on-line transaction. In the absence of a contractual choice of law, consumers can still exercise a choice of applicable law by selecting a vendor accordingly.

Governments should provide easy-to-understand information on-line regarding their law, including in particular provisions on consumer protection. They should also adopt policies that promote, or at a minimum do not infringe upon, freedom of contract, and do not prevent consumers from choosing applicable law by selecting offers of specific vendors. In the absence of other obvious and compelling criteria, and in particular in transactions involving multinational companies, with regard to civil damage the law of the "main establishment" of the vendor should be used according to the "country of origin" principle.

Choice of forum

Business should not exclude the possibility for consumers to go, eventually, to court if out-of-court mechanisms have failed to settle a given complaint.

Governments should, in the absence of a choice of national forum provisions in a contract or in the case of a civil claim based on an alleged violation of a non-contractual obligation, permit the defendant to choose the forum, whether a consumer or a business entity.

Convenience

Internet domain names

Business should use domain and web site names which are not misleading and which enable the consumer to quickly locate the desired web site.

Governments could play a role in creating awareness of the new global body responsible for the assignment of domain names, the Internet Corporation for the Assignment of Names and Numbers, ICANN.

Cost and user-friendliness

Business should continue to create and develop user-friendly hardware and software apt for the purposes of electronic commerce.

Governments should liberalize markets to reduce the costs of using the Internet.

Language

Businesses should be able to establish a Web site whenever they want and in whatever language they choose, while at the same time making possible communication in the languages of the targeted consumers. New software that makes the communication of specific messages (e.g., the ordering of goods) largely independent of the languages used on both ends (consumer and vendor) should facilitate this task.

Governments should not impose mandatory language requirements. Competition will oblige business engaged in electronic commerce to increasingly offer their products in the languages of all relevant markets. This should neither be hindered nor forced.

GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



CONTENT AND COMMERCIAL COMMUNICATIONS

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Introduction

In order for electronic commerce to reach its full potential on a global scale, industry and governments must work towards certain basic, internationally-compatible principles relating to online content. Freedom of expression should be protected in the online environment to the same extent that it is protected in the offline environment. Governments need to balance freedom of expression against competing public policy interests in order to create an environment in which electronic commerce can flourish. By imposing divergent rules and regulations, national governments will create a patchwork of fragmented and incompatible requirements that will make compliance and enforcement impossible and will seriously hinder the development of electronic commerce. The GBDe believes that many of the content-related issues in electronic commerce should be addressed through self-regulation and market-based solutions. This chapter does not address issues relating to liability for illegal content, as these issues have been addressed in the chapter on Liability.

Protection of Minors from Harmful Content

Although the GBDe acknowledges that the protection of minors (and of young children in particular) from harmful content on the Internet is an important public policy interest, we believe that regulation is not the best or most effective means to ensure such protection. This issue can best be dealt with through self-regulatory and voluntary industry-led initiatives, as well as the development of empowerment technologies that give caregivers the ability to choose the sorts of content that children access. There are already a number of market and industry-led initiatives underway, including caregiver choice and other empowerment technologies (i.e., content filtering and monitoring software, control chips and other blocking technologies); content screening services; self-regulatory codes of responsible online behavior; voluntary self-rating programs; and programs designed to promote awareness and educate caregivers about Internet safety. Business is very motivated to continue to develop market-based solutions to protect minors from harmful content on the Internet, not only because of the important public policy interests at stake, but also because such solutions help generate consumer confidence and are ultimately good for business. Governments should, therefore, refrain from regulating this area and encourage business to find effective and internationally applicable solutions to these problems.

Commercial Communications

The GBDe recommends that governments adopt an approach to online commercial communications that combines voluntary self-regulation, “mutual recognition”, and “country of origin” principles. The general application of the principles of mutual recognition and country of origin will ensure that suppliers of electronic goods and services are required to comply with the laws relating to commercial communications of the country where they are established. Applying the law of the country in which the user is located would seriously impede the growth of electronic commerce, denying residents of certain countries the benefits of electronic commerce. Commercial communications will benefit consumers by empowering them to make informed choices about their online purchases. The ICC Guidelines on Advertising and Marketing on the Internet provide a framework for effective self-regulation in this area. In relation to unsolicited online commercial communications, as in the case with unsolicited offline commercial communications, such communications should be allowed unless the end-user has expressed a desire not to receive such communications (i.e., an “opt-out” system).

Content Regulations, Including National Cultural Heritage

Trade Barriers and GATS

National governments have a legitimate role to play in the protection and promotion of national cultural heritage and identity, but these policy interests should not be translated into market access and other trade barriers that will impede the development of electronic commerce.

Spectrum Scarcity vs. Spectrum Abundance

In the analog environment of the past, content competed for scarce distribution and national governments imposed content regulations, including broadcast quotas, to protect their national interests, including their national cultural heritage and identity. Today, digital technologies and applications have changed the landscape, and there is more than ample distribution capacity for all content. Many of the content regulations of the past affecting online and digital content and distribution are difficult to justify in light of these developments.

Consumer Empowerment and Interactivity

Interactivity and the empowerment of the consumer are essential components of electronic commerce because they give the consumer the flexibility to choose for themselves what content to consume (much like a retail consumer visiting an offline bookstore). Neither governments, nor other public or private sector enterprises, should interfere in any way in basic and personal decisions of consumers relating to the consumption of legal content.

Attracting Capital Investment and Encouraging Job Growth

In order for global electronic commerce to achieve its full potential, sustained capital investment in infrastructure and on-going operations will be required. Excessive government regulations affecting online content will disincentivize investors and slow the growth of electronic commerce.

Promoting Global Competitiveness

Electronic commerce is global in scope, and there is a need for pro-competitive business conditions internationally in order for industry participants to remain competitive irrespective of national origin. Companies handicapped by content regulations may have to compete with companies in other parts of the world which do not suffer from similar handicaps, thereby leaving the former at a disadvantage.

Recommendations

Recommendations to Governments

The Internet should be recognized as a communication forum in which freedom of expression is respected to the same extent as in conventional offline communication fora. Governments should refrain from imposing divergent national rules and regulations relating to online content and commercial communications which will create a patchwork of fragmented and incompatible requirements that will be impossible to comply with and enforce.

Governments should encourage business to continue to find effective and internationally-applicable market-based and technological solutions and refrain from imposing regulation to protect minors from harmful content on the Internet.

With respect to online commercial communications, governments should support the general application of the country of origin principle, subject to certain exceptions, so as to ensure that electronic commerce reaches its full development potential on a global scale.

Governments should encourage the development of self-regulatory codes of conduct which promote responsible online advertising and marketing, and refrain from imposing bans and restrictions on online commercial communications.

With respect to unsolicited online commercial communications, governments should encourage the development of self-regulatory solutions, such as a system whereby such communications are allowed unless the user has expressed a desire not to receive such messages (i.e., an opt-out system).

With respect to the upcoming WTO round of trade negotiations, existing GATS liberalization commitments applicable to the electronic delivery of services must be rigorously applied, and where possible, improved, and any new limitations, including culturally-motivated limitations, in the area of electronic trade in services should be resisted. Furthermore, WTO member countries should carefully examine the implications of the classification of electronic commerce for trade purposes before final decisions are reached, and refrain from making premature classification decisions.

Recommendations to the Business Community

Industry should continue to develop, test and make available caregiver choice and other empowerment technologies that can be used at the discretion of caregivers to block access by children to harmful content on the Internet.

Industry should endeavor to participate in the development of voluntary, internationally-compatible guidelines for responsible online behavior and self-rating systems for online content.

Industry should endeavor to participate in initiatives designed to improve the level of awareness and promote the on-going education of parents, caregivers, educators and children of the means available by which the Internet can be made safe for minors.

Industry should adhere to existing self-regulatory codes of conduct which promote responsible online commercial communications, such as the ICC Guidelines.

Industry should endeavor to participate in the development of opt-out systems, whereby users may express a desire not to receive unsolicited electronic direct marketing messages.

GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



INFORMATION INFRASTRUCTURE AND MARKET ACCESS

SEPTEMBER 13, 1999

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Introduction

Infrastructure is the critical backbone for effective global electronic commerce. This chapter identifies the issues, and proposes actions needed, to evolve today's voice-optimized communication networks into appropriately high-speed, interoperable, data-optimized networks, embracing all types of communication access, required to enable global, borderless electronic commerce services. It recognizes that a robustly-competitive and market-driven environment, promoted by the collaborative efforts of the private sector, governments and regulators, is necessary to meet the challenge of creating the appropriate climate to build the physical infrastructure over which these services will run, and to attract the needed investment. Other requirements identified by the GBDe in this chapter to facilitate the growth of electronic commerce services include affordable universal access, and minimum appropriate regulation and governance.

Recommendations

Establish a market-led, competitive environment conducive to driving infrastructure development

The most important enabler for electronic commerce is an effective competition environment. The willingness of business to invest in the physical infrastructure depends on a fair competitive climate and the opportunity for reasonable financial return over time. Technology evolution and convergence show significant potential for alternative forms of broadband network infrastructures, and should be encouraged. A robustly-competitive marketplace guarantees investment in, and fast development of, broadband capability deployment, improves access conditions, enables an expanding potential usage; and leads to an increase of innovative services including those in other sectors such as education, healthcare, and financial services.

Government action required:

- facilitate the development of competition by opening markets and eliminating any barriers to competition. This includes ensuring fair and equitable interconnection rules, correcting unequal treatment and subsidies, encouraging investment in information infrastructure development, and reducing or eliminating foreign investment restrictions and other entry constraints.

Business action required:

- in response to an open market environment without entry barriers, encourage investment to evolve information infrastructure development including technological innovation, alternative network deployment and other support for enhanced borderless electronic commerce services.

Use the WTO to facilitate broadband infrastructure and service deployment

In general, the necessary framework for electronic commerce and information infrastructure is already set down in WTO agreements, such as GATS and the Basic Telecommunication Agreement.

Government action required:

- focus on the urgent implementation of existing WTO rules and the expansion of the number of signatories;
- harmonize conflicting rules that prevent seamless cross-border flow of communications;
- expand undertakings in the course of the ITA II negotiations and, in the new WTO round, to further eliminate tariffs on technology products, to assure the application and extension of commitments to facilitate the growth of the broadband environment worldwide.

Embrace the Concept of Keeping Regulation to a Necessary Minimum

In general, open competition is preferable to regulation to achieve policy objectives. Therefore, regulation should be minimized, and as far as possible, used only until effective competition is established

Government action required:

- Limit regulation to a necessary minimum, for example by recognizing the principle of self-regulation (codes of conduct, brand reputation, etc) where appropriate, to facilitate a competitive environment and implement effective, global electronic commerce;
- ensure that any regulation is technologically neutral, embodies an open, transparent, non-discriminatory and non-burdensome process, and is clearly laid out and harmonized at an international level where necessary to ensure that competitive services are not impeded;
- employ targeted regulation where necessary to stimulate a more competitive environment and ensure access to basic communications infrastructure essential facilities.

Business action required:

- develop and implement self-regulatory measures where appropriate and where free market forces may not be sufficient.

Foster Interoperability and Open, Market-Driven Standards

Interoperability between networks and services is critical to realize the full benefits of effective global electronic commerce. International, open, market-driven standards that are being developed by several expert multinational bodies are essential to accomplish this objective.

Business action required:

- continue to lead interoperability efforts including standards where required by the market;
- avoid the imposition of unnecessary standards that could constrain innovation and technological process and choice;
- increase efforts to reduce the time and overhead to develop timely standards necessary to meet market needs, without costly delays.

Joint government and business action required:

- where governments are involved, both parties should partner their efforts collaboratively.

GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



INTELLECTUAL PROPERTY RIGHTS

SEPTEMBER 13, 1999

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Introduction: The Importance of Intellectual Property Protection

The Global Business Dialogue on Electronic Commerce (GBDe) supports strong intellectual property rights protection for works made available over digital networks, while promoting the lawful use of such works by consumers.

For content providers, intermediaries and users, the value of the electronic environment depends in part upon the content that is made available upon international digital networks. Growth in attractive content, stimulated by adequate intellectual property protection, will in turn stimulate the growth of electronic commerce and the infrastructure needed to sustain it.

Inadequate and ineffective protection of intellectual property in the networked environment will not only stifle the full potential of electronic commerce, but will also distort trade in works of authorship in non-networked markets.

Top Priorities of Business Concern

Need for Intellectual Property Enforcement

Electronic commerce will not develop to its fullest potential until problems with enforcement of copyright laws are resolved.

Government action required:

- providing rightholders with effective and convenient means of pursuing copyright enforcement actions in each jurisdiction where infringement occurs;
- encouraging the improvement of judicial proceedings, remedies, and workable liability rules for copyright infringement in all countries, in order to achieve effective enforcement and deter infringement; and
- promoting a copyright awareness program among public, industrial and educational organizations to educate users on the importance of copyright protection and compliance with copyright laws, which together foster creative activities.

Prompt, Faithful Ratification of WIPO Treaties

The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty rightly encourage the establishment and maintenance of legal regimes that give copyright and

neighbouring right owners the ability to authorize or prohibit the use of their works or phonograms, including their communication through digital media, and effective means through which to enforce such rights.

Government action required:

- Governments should ratify and implement the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty promptly and faithfully.
- As part of treaty implementation, appropriate legal frameworks should be enacted for effective technological protection measures.
- Such legislation should also prohibit harmful circumvention related activities by regulating both conduct and devices, while providing appropriate exceptions, such as those set forth in the legislation recently enacted in the U.S., that would maintain the overall balance between rightholders and users.

Promotion of Technological Innovation

The GBDe supports further development of technology to protect effectively the interests of all parties involved in electronic commerce, particularly to enable copyright rightholders to attain the fullest enforcement of their rights.

Business action required:

- The GBDe believes that effective technologies are most efficiently developed through private sector initiatives and any standards which are developed should reflect a broad based industry consensus.

Government action required:

- While ensuring full and effective copyright enforcement, governments should avoid taking legislative measures that impede the innovation of technology.

Workable Liability Rules

Government action required:

- The GBDe encourages adoption of the principles on service-provider liability agreed among rightholders and service providers, such as those reflected in the recently enacted U.S. legislation, in the case of any legislation dealing with the issue of intellectual property liability. These principles recognise the common stake of rightholders and service providers in ridding the electronic marketplace of infringing material.

Importance of WTO TRIPs Agreement

The GBDe attaches great importance to the WTO Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs). Adequate and effective intellectual property protection and its enforcement are the third pillar of the WTO, along with liberalized trade in goods and services.

Government action required:

- All WTO member countries should implement and enforce TRIPs fully, faithfully, and promptly.
- Countries seeking accession to the WTO should be encouraged to bring their enforcement regimes into compliance with WTO TRIPs standards.

Domain Names

Joint Business and Government action required:

- The GBDe supports the recent WIPO recommendations to ICANN regarding domain names, and encourages prompt ICANN implementation of these recommendations.

Importance of Harmonizing Intellectual Property Protection

Government action required:

- The GBDe looks to governments to bring new impetus to harmonizing intellectual property protections world-wide.
- Harmonization and implementation should be targeted not only upon the online electronic environment, but also the illegitimate reproduction, distribution and importation of protected materials.
- In this regard, governments should ratify and fulfil their international obligations under all major intellectual property and related treaties, including the 1971 Paris text of the Berne Convention for the Protection of Literary and Artistic Works.
- Much more work on enforcement needs to be done to control the illegitimate production and distribution of such “optical media” as compact discs (CDs), CD-ROMs, video CDs (VCDs) and Digital Versatile Discs (DVDs).
- The GBDe encourages governments to study and, if appropriate, to provide for the optimal level and means of protection for databases world-wide.

GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



JURISDICTION

SEPTEMBER 13, 1999

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Introduction

Clear, predictable, and transparent legal rules on jurisdiction are crucial to the growth of electronic commerce on a global scale. Without jurisdictional rules that make sense for businesses, growth of electronic commerce will encounter legal barriers and retard economic benefits to all societies. Equally important is the issue of consumer protection and remedy mechanisms that are critical to build consumer confidence in using the electronic medium for purchasing goods and services.

The GBDe has focused on three important issue areas: which court or forum will decide a dispute, which law will be applied, and most important to building consumer confidence, what remedies will consumers have when problems arise?

Considering the global context of electronic commerce, traditional jurisdictional issues need to be harmonized at the international level as much as possible, but the convergence of conflicting legal systems will be difficult and will take many years to accomplish. It is crucial that governments and international organizations understand the complexity of the legal issues raised by the use of global networks to conduct trade in a borderless environment, and that they appreciate the interactive dynamic of the Internet, the new economic opportunities, and the enhanced individual empowerment that results, particularly for consumers.

The GBDe has given significant attention and debate to the issue of consumer confidence and consumer protection. One of the major conclusions of the GBDe jurisdiction group is that applicable consumer protection laws may not fully provide consumer confidence. Focusing solely on deciding which law is applicable as a means to provide consumer protection is probably not efficient enough for consumers, or for businesses for that matter. Even when it would be possible for a government to require that a buyer's consumer protection laws be controlling, and even when a court in a buyer's location would rule in favor of the buyer, enforcement of such laws and court judgements outside of the location of the buyer is not practical in most cases and does not usually meet the needs of consumers.

Consumers must trust that when a problem occurs in connection with an electronic commerce transaction, access to a remedy will be timely, easy, inexpensive, and readily available from any location. This approach makes sense, since most problems or complaints in electronic commerce currently involve small claims. Businesses and governments should cooperate to provide consumers with more efficient remedial mechanisms by increased use and legal recognition of alternative dispute resolution mechanisms and by creating new on-line self-regulatory approaches, including codes of conduct, trust-mark and seal programs. While governments and businesses continue to discuss the relative merits of various classical jurisdictional approaches, businesses must take the lead in providing new, effective, efficient systems that deliver remedy to consumer issues.

In arriving at its recommendations, the GBDe focused on three issues important to businesses, consumers, and governments worldwide:

- Will the recommendations facilitate and encourage the development of electronic commerce on a global scale?
- Will the recommendations acknowledge the need for a company or an individual to obtain timely, cost effective handling of disputes or claims?
- Will the recommendations foster participation by small- and medium-sized businesses, and by businesses located in developing economies?

This chapter has limited its recommendations to transactions relating to sales of goods and services (including advertising, solicitations, disclosures and the licensing of services) in the global electronic medium. In the absence of contract, the discussion and recommendations specifically exclude other issues such as tax, national security, fraud, intellectual property, public safety, transport, immovable property, administrative and public entities, because conflict of law and jurisdictional rules may vary.

The GBDe is concerned that discrepancies in local, national, and international conventions and laws dealing with jurisdiction and choice of law are hindering the expansion of electronic commerce. We are also concerned that new laws and regulations about jurisdiction are being agreed upon and implemented without due consideration for their impact on global electronic commerce. Considering the inherently international nature of electronic commerce, the GBDe strongly believes that rules on jurisdiction and choice of law need to be harmonized at the international level.

Recommendations

Alternative Dispute Resolution (ADR) – Arbitration, Mediation, and Conciliation

The GBDe recommends that:

- Governments favor the development of ADR mechanisms, (e.g., arbitration and mediation or conciliation), provided that the parties agree to it, as an efficient alternative to the jurisdiction of national and local courts. Governments should promote on-line ADR mechanisms.
- Governments pass any legislation that may be necessary to authorize and promote such ADR mechanisms in cases involving business entities or consumers.
- Governments that have not already ratified the New York Convention should do so, or alternatively, should adapt their own legal frameworks so that arbitral awards may be more easily acknowledged and enforced.

Self-Regulation, Codes of Conduct, Trustmark and Seal Programs

The GBDe recommends that:

- Businesses and governments cooperate to develop remedies and approaches that work efficiently for consumers from any location, and that are consistent with the goals of consumer protection in most economies. This is the best way to insure the responsive, timely resolution of problems, and will save consumers the frustration and expense of traditional legalistic approaches that seldom deliver the remedy that they seek.
- Information about alternative dispute resolution mechanisms should be readily available on-line.

The Principles of Freedom of Choice and Freedom of Contract

The GBDe strongly recommends that:

- Governments adopt policies that continue to promote, or at a minimum do not infringe upon, freedom of contract and permit parties to agree on terms mutually acceptable to them for electronic commerce, just as is currently the case in traditional commerce.
- Governments provide clear and accurate information on the applicable legal rules for electronic commerce. The private sector should also provide information; for example, by voluntarily providing links to public web sites set up by governments.
- Government harmonize, by way of international cooperation, consumer protection principles that would be acceptable by all states and would leave it to the private sector to organize itself by way of self-regulatory codes of conduct. Transparent and close cooperation between the GBDe, private sector, and governments is necessary to achieve this goal.
- Governments harmonize their laws in order to reduce, as much as possible, any legal uncertainties resulting from different positions. Moreover, governments should remove any existing legal or statutory barriers and prevent any new regulations from reducing this freedom to contract.

Applicable Law in the Absence of Contractual Choice of Law

The GBDe recommends that:

- In the absence of a contractual choice of law, governments adopt legal rules (whether by national laws, bilateral agreements, or multilateral treaties) that apply the law of the country of residence of the party carrying out characteristic performance of the electronic commerce contract. This is most commonly referred to as country of origin principle.
- Businesses engaged in electronic commerce provide consumers with accurate and easy-to-understand information related to the terms of the on-line transaction, and governments should provide easy-to-understand

information on-line regarding the consumer protection laws of their jurisdiction.

Civil and Criminal Law Issues

The GBDe recommends that:

- In relation to the law applicable to civil damage, the country of origin rule should apply.
- States adopt clear legal rules governing the activities of business entities located in their territory, and they should communicate such rules to the public.
- In the absence of other obvious and compelling criteria, the concept of “main establishment” be used to determine the location of a multinational group or company.
- Governments and business provide strong support for full development of self-regulation at the worldwide level, as it is the best way to globally-harmonize applicable rules.
- Further study of criminal law issues is needed to determine their impact on global electronic commerce before any recommendations are made in this area.

Choice of Forum

The GBDe recommends that:

- Court proceedings continue to be the ultimate solution in case of disputes, though out-of-court dispute resolution mechanisms by means of arbitration or self-regulatory approaches are a workable and effective alternative in many cases.
- In the absence of a choice of national forum provision in a contract or in case of a civil claim based on an alleged violation of a non-contractual obligation, the defendant, whether a consumer or a business entity, should be able to choose which court will rule on the case.

GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



LIABILITY

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Introduction

The proposal of the Issue Group on Liability is based on the principles of co-ordination and co-operation with the contact points of the Americas and Asia/Oceania regions, and with the main companies to which the issue of liability concerns, such as content providers, carriers, and service providers among others.

Objectives

- To ensure the supremacy of the rule of freedom of contract as the basic principle applicable to electronic transactions.
- To develop a consensus amongst the different stakeholders engaging in electronic commerce and to make recommendations to governments and the business community that are consistent with this consensus.
- To recommend that any legal framework adopted relating to liability is compatible and consistent with the stakeholder consensus contained in the Trans Atlantic Business Dialogue (TABD) Recommendations of November 1998, the underlying principles reflected both in the United States Digital Millennium Copyright Act (DMCA)⁶ and the proposed European Union Directive on Certain Legal Aspects on Electronic Commerce⁷.
- To encourage and contribute to the development of self-regulation and market solutions through widely-adopted voluntary codes of conduct to promote responsible online behaviour and recognition of the concept of shared responsibilities among all parties.
- To take, where feasible and appropriate, a horizontal approach to the issue of liability for most legally controlled content and activities that could provide a foundation upon which to build a robust electronic commerce environment.

⁶ Digital Millennium Copyright Act. Title II, Sec. 202: A law which represents an important consensus of the various stakeholders in the electronic commerce environment and which addresses, in this Section, the issue of liability for copyright infringements.

⁷ This proposed European Union Directive addresses, among other things, the issue of liability of intermediaries, and applies horizontally to a broader range of laws, including copyright infringement.

Recommendations

All stakeholders, including content providers, service providers acting as intermediaries and end-users have a common interest in fighting illegal activities in the digital environment and establishing a predictable, efficient legal and business framework to ensure the full development of an electronic marketplace.

Any legislation that deals with the issue of liability should carefully consider the effect such laws have on the interests of all stakeholders in the electronic environment, and needs to strike a careful balance between the legitimate business interests of the different stakeholders involved, including content providers, service providers and end-users.

Models to be followed in seeking such a balanced approach include: TABD Recommendations of November 1998, the United States Digital Millennium Copyright Act and the proposed European Union Directive on Certain Legal Aspects on Electronic Commerce.

The liability issue should be addressed, where feasible and appropriate, in a horizontal manner.

In order to promote electronic commerce, governments should eliminate impediments to contract-based arrangements that will reduce the risk of illegal online activities and facilitate their detection and elimination. Since these arrangements cannot be constructed without the maximum degree of contractual freedom for all parties concerned, the Issue Group on Liability believes that the freedom of contract should rule the development of electronic commerce.

Eligibility for any specific limitations on liability of stakeholders should be determined in relation to specific and well-defined activities and functions. Intermediary activities and functions, i.e., storage of material at the direction of a user, system caching and acting as a mere conduit, must be defined in terms of compliance with a number of reasonable pre-conditions which are related to each such specific activity or function. If the conditions are not met, then the limitations on liability should not apply. This approach is consistent with those taken by both the US and the EU in this area.

The principle of "immediate offender pays" should guide liability in a general context. This means that the person/party who commits the illegal act in the digital environment is the immediate offender and therefore should be primarily held liable for it. In specific cases, however, liability could be shared by more than one offender or even go beyond the immediate offender.

When the notice and takedown procedure is used to remove allegedly unlawful material, the DMCA could serve as a good basis for the development of such a procedure. This means that certain formal requirements must be followed. Intermediaries should not be

held liable for the removal of or disabling access to alleged unlawful content done in accordance with this procedure.

Any legal framework, including a notice and takedown procedure, should provide a safe harbour provision exempting service providers from liability and/or damage claims resulting from taking down or blocking access to allegedly unlawful material.

Any framework that provides for limitations on liability for service providers should be restricted to damages and other monetary relief. Injunctive relief and other forms of equitable relief should be available subject to applicable laws governing such relief.

Eligibility for any limitations on liability should be subject to appropriate general threshold conditions. The DMCA could provide a basis for the establishment of such conditions, however, the nature of such conditions elsewhere is still subject to further discussion.

Any framework should refrain from imposing on service providers a general requirement to monitor the information they transmit or store, and should refrain from imposing unreasonable burdens on the various stakeholders.

Any framework should encourage the development of self-regulation and market solutions through widely-adopted voluntary codes of conduct to promote responsible online behaviour and recognition of the need of shared responsibilities among all parties.

GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE



PROTECTION OF PERSONAL DATA

SEPTEMBER 13, 1999

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Introduction

Establishment of Minimum Principles for Personal Data Protection Programs

Recognizing the importance of electronic commerce now and in the future, the GBDe seeks to establish a set of minimum standards for the protection of individually-identified or identifiable data (Personal Data) collected in the electronic commerce business/consumer relationship. As electronic commerce becomes more widespread, consumers will seek out businesses that can assure them that their personal information is secure. The five GBDe Principles are:

- Adoption and Implementation of a Personal Data Protection Policy - enforcement in the form of a compliance program and education of executives and relevant employees
- Collection of Personal Data - purpose specification and opt-out mechanism
- Use and Distribution of Personal Data - in principle, use/distribution of personal data in accordance with the purposes for which it was originally collected
- Data Security - assurance of reliability and protection of Personal Data
- Data Quality and Access - assurance of accuracy of Personal Data and data subjects' rights of disclosure, correction, and deletion

These principles are intended to provide minimum standards for the protection of Personal Data. However, it is also imperative to protect the free flow of Personal Data across borders in order to promote the expansion of electronic commerce. Where some governments may desire to impose restrictions on data exchange, the adoption of the GBDe Principles would not only promote international compatibility and uniformity, but also demonstrate that an adequate level of protection has been implemented. In this way, security concerns regarding transborder data flows would be alleviated.

Self-Regulatory Enforcement

The GBDe recognizes that, due to the evolving nature of electronic commerce and communication, businesses directly involved in the development of electronic commerce are in a better position to practice protective measures than are governments. In this light, the GBDe endorses two forms of self-regulation in the Personal Data protection field:

- Third-Party Enforcement Program (Seal System): Use of a seal program, with an easily-recognized mark, to denote that a business/organization is utilizing a GBDe-standard Personal Data protection policy. Awarding of the seal would be by trusted parties, such as trade associations or private organizations.
- Self-Declaration System: Businesses which have already acquired public trust, e.g. through trademark recognition, declare independently that they

utilize a GBDe-standard Personal Data protection policy or other criteria which businesses deem adequate for Personal Data protection purposes.

Recommendations

Business and Government Should Cooperate to Promote the GBDe Principles and Implement Personal Data Protection Policies

Business action required:

- Personal Data protection will become a principal concern for consumers as electronic commerce continues to grow. Businesses will have a strong reason to respond to this concern, and should choose the method of data protection that works best for their industry. Each should use the GBDe Principles as a guide toward fair and reasonable means of data protection.

Government action required:

- Government regulation will not necessarily provide the most adequate protection of Personal Data in the fast-moving world of electronic commerce. Moreover, it is imperative that governments not adopt any measures that would limit or interrupt the free flow of data across international borders. Any restrictions on transborder data flows would have a negative effect on free trade and commercial development.

Joint Business and Government action required:

- In order for consumers to understand and recognize the importance of Personal Data protection, businesses and governments should work jointly to educate and promote the GBDe Principles, and to ensure implementation of Personal Data protection policies by companies working in electronic commerce.

Promote the Development and Use of Self-Regulation Mechanisms

Business action required:

- Each business would be individually responsible for choosing either the Seal System, or the Self-Declaration system, depending on its own circumstances. A self-regulatory system should have a methodology to deal effectively with customers' complaints. Any system without an adequate structure to meet customers' expectations will be forced out by the market. Thus, it is up to businesses individually to implement the highest feasible level of protection.

Government action required:

- Government action in this field should be limited, as the focus of self-regulation is upon business action. While governments play an important role in the promotion and encouragement of self-regulation, they should not apply stricter rules on data protection in the online environment than those that apply in the offline world.

Joint Business and Government action required:

- Business and governments should cooperate to develop self-regulatory mechanisms that are internationally-recognized and that provide both business and consumers with the necessary confidence in the protection of Personal Data in electronic commerce.

**GLOBAL BUSINESS DIALOGUE ON
ELECTRONIC COMMERCE**



TAXATION AND TARIFFS

SEPTEMBER 13, 1999

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Introduction

The business community in general and the GBDe in particular is committed to working with governments and regulators in identifying and implementing solutions to the taxation of electronic commerce. The message from business is that there is a need for a clear, simple and predictable tax environment which provides a level playing field for all operators. A priority must be to resolve uncertainty about tax obligations that might prove a major impediment to the development of electronic commerce.

Concerning the indirect taxation of electronic commerce (such as value-added taxes or VAT), the Issue Group believes that this topic raises questions which concern not simply the external interface of the common VAT system, but will also involve legislative and operational changes in the existing VAT system which will have fundamental implications for the way in which this system functions in the future.

Electronically-delivered services should be considered as a single and homogeneous category for tax purposes. Complex rules about categorisation will have to be avoided. The type and nature of the services which can be supplied by electronic commerce will continue to grow and a single clear rule is necessary.

The GBDe will stay in contact with governments and regulators around the world which deal with the taxation of electronic commerce, and will continue the dialogue within the business community to identify problems and work toward a common solution.

Recommendations

General Principles

- A new tax regime to deal with electronic commerce is totally unwarranted.
- Techniques for applying existing taxation principles in the electronic medium must be built upon tools that businesses already use or are required to develop to meet their market needs.
- Simplicity and clarity must be promoted in national tax regimes, in order to allow for the global trading potential of the new communications media.

Direct Taxation

- There is no compelling need to promote a wholesale adoption of new permanent establishment rules for purposes of electronic commerce.
- New rules to govern the classification of income are unnecessary.

- Transfer pricing should not be considered in a discussion of the tax consequences of electronic commerce, since transfer pricing issues are not affected by the development of electronic commerce.
- There is a need for clarification of the existing OECD – Master Agreements on double taxation as they affect electronic commerce.

Indirect Taxation

- It is important to design rules that foreign and domestic business can understand and administer. The incidence of non-compliance, particularly for foreign businesses, increases significantly as rules become unreasonably complex and burdensome to administer.
- Electronic commerce transactions should not be treated less favorably than non-electronic forms of commerce, and complex compliance regimes requiring service providers or banks to act as collection agents should be avoided.
- To provide consistency with non-electronic commerce, the responsibility for compliance should remain with the vendor/supplier unless and until the individual consumer can be made responsible at the place of consumption in a convenient manner.
- Solutions that may work well on a purely local basis, such as voluntary registration schemes or unilaterally reclassifying such products as services, should be refocused towards globally-acceptable rules.
- Special attention should be given to the extent to which the extension of international co-operation in the area of taxation has already had positive results on electronic commerce.

Customs Tariffs on Electronic Commerce Transmissions

- The WTO's current practice of not imposing customs duties on electronic transmissions should be made permanent and binding.