

TRANSATLANTIC CONSUMER DIALOGUE
WASHINGTON MEETING, 10-12 FEBRUARY 2000

TACD RECOMMENDATIONS ON ELECTRONIC COMMERCE
AND
EUROPEAN COMMISSION SERVICES' RESPONSES

The services of the European Commission welcome the TACD's contribution to the policy debate on electronic commerce.

We share the view that the subject matters raised in the Resolutions and Recommendations are important both for the development and promotion of electronic commerce as a whole and, in particular, for stimulating consumer confidence. By continuing to raise awareness of and make recommendations on particular problem areas, TACD offers valuable input into the ongoing policy process.

A number of recommendations are being implemented in the EU or are already part of the Community legal framework. We believe, however, that some concerns expressed do not lend themselves to a legislative solution. The nature of cross-border electronic commerce is such that legislation will not always be the most effective or desirable option. Against this background, we place particular emphasis on the need for market driven solutions through co-operation, dialogue and consensus building between industry representatives and the consumer organizations. The services of the European Commission therefore urge the TACD to also present its Resolutions, recommendations and requests to the business community and to enter into a dialogue with them. Establishing and retaining consumer confidence is a major challenge for the business community. This challenge offers unprecedented opportunities for the consumer organizations to enter into a co-operative and productive dialogue with the business community.

We recognize that EU consumer mistrust in this new transactional medium is an important barrier to the development of e-commerce. The issue of consumer confidence must be tackled if electronic commerce is to deliver its full potential in the interest of all parties concerned. The European Union's e-Europe initiative places particular emphasis on this.

Among the various Resolutions and recommendations put forward, we would like to concentrate on alternative dispute resolution.

Market practice and public policy should first and foremost be geared towards the prevention of problems. But where problems arise, consumers must be guaranteed easy access to quick, fair and effective redress. The development of alternative dispute resolution mechanisms is crucial in achieving this aim. This is the central issue to the consumer confidence policy debate on both sides of the Atlantic at the moment. We urge the TACD to attach particular attention to this debate. The policies and structures for cross-border ADR mechanisms for electronic commerce are being developed at this stage. Being present in the debate by making active and constructive contributions offers TACD the best guarantees to have a determining and lasting influence on a key element of consumer confidence in electronic commerce.

TACD RECOMMENDATION ON THE MERGER OF AMERICA ONLINE AND TIME WARNER AND PRIVACY PROTECTION IN THE INTERACTIVE BROADBAND ENVIRONMENT

Given the risk to consumer privacy that the AOL-Time Warner merger presents, the other mergers between multimedia companies that will likely follow, and the absence of effective measures to safeguard consumer interests, the TACD will:

- 1. Urge US officials to condition approval of the proposed merger on the adoption of enforceable Fair Information Practices that would guarantee consumer privacy safeguards at least equal to those that would be provided under the EU Data Directive.**
- 2. Urge US officials to pursue adoption of a comprehensive privacy law, comparable to the EU Data Directive, as opposed to the sector specific laws that do not correspond to the range of activities pursued by combined entities such as the proposed AOL-Time Warner Corporation.**
- 3. Urge the Safe Harbor negotiators to consider how the protection of personal information needs to be safeguarded in light of such mergers.**
- 4. There are many media and e-commerce mergers that will undermine consumer privacy, by giving firms much greater access to personal information. TACD asks the US and the EU to consider the impact of mergers on privacy, as one factor in the review to determine if a merger is in the public interest. We further ask that the EU and the US create legal mechanisms to address privacy concerns of mergers, such as mechanisms to place conditions on mergers that would protect consumer privacy.**

EUROPEAN COMMISSION SERVICES' RESPONSE

We share the TACD's concern that mergers and acquisitions are potentially a threat to privacy protection especially if one of the two partners abided to a higher privacy standard prior to the merger.

In our informal dialogue with the Department of Commerce we have raised the question of how to protect personal information in the case of mergers and are actively working with the Department of Commerce and the FTC towards a satisfactory solution within the framework of the Safe harbor.

With regard to the AOL/Time Warner merger, we believe the case is presently before the Federal Trade Commission and awaits its findings before making any comments.

The proposed merger is also being investigated by the European Commission for compatibility with the EU merger control rules provided for in Council Regulation 4064/89. This examination will be completed by the end of October 2000.

TACD RECOMMENDATION ON UNSOLICITED COMMERCIAL EMAIL

The use of unsolicited commercial email is a growing burden for persons who use email. Consumers need better mechanisms to control and manage unwanted commercial solicitations. This is an international problem. Governments need to work together to develop common approaches to address consumer concerns about unsolicited commercial email.

One approach would be to require labelling of unsolicited commercial solicitations by electronic mail, so that consumers or Internet service providers can better manage such information. Such approaches should recognize the distinction between commercial and non-commercial speech. TACD asks the US and the EU to report on efforts to coordinate the development of international mechanisms to address the problem of unsolicited commercial email.

EUROPEAN COMMISSION SERVICES' RESPONSE

The issue of unsolicited commercial communications is addressed by:

- Directive 97/7¹ of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.
- Directive 97/66² of the European Parliament and the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.
- Directive 2000/31/EC³ of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Under Directive 97/7 prior consent of the consumer is required for the use of automated calling devices without human intervention, as well as facsimile machines. As regards all other means of distance communication these may only be used where there is no clear objection from the consumer. Directive 97/66 contains almost identical provisions, clarifying that the choice between a requirement of prior consent (opt in) or the possibility for the consumer to indicate that he does not wish to receive unsolicited messages (opt out) is a matter to be determined by each Member State through national legislation.

Directive 2000/31 further defines how to deal with unsolicited commercial communications in the EU. More specifically, article 7 of the Directive states:

Article 7

Unsolicited commercial communication

1. *In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such*

¹ OJ L144, 04/06/1997, p. 19

² OJ L 024, 30/01/1998 p. 1

³ OJ L178, 17/07/2000, p. 1

commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. *Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.*

The first paragraph meets the TACD's labelling requirement. The second seeks to allow consumers to avoid receiving such mail. The reference to opt-out registers reflects the fact that these are quite well-developed in the European Community in the field of telemarketing and direct mail where most Member States already have such systems. Moreover, a number of Member States are working towards the establishment of similar on-line "Robinson" lists.

In addition, on 12 July, the European Commission adopted a package of legislative proposals designed to strengthen competition in the electronic communication markets in the EU. Among the proposals is a draft amendment of the Directive concerning the processing of personal data and the protection of privacy in the electronic communication sector. According to Article 13 of this *draft* directive, which is yet to be adopted by the EU Member States, direct marketing using e-mail is only permitted where the subscribers have given their prior consent (i.e. "opt-in"). Already today four (soon to be five) Member States have banned unsolicited electronic mail to subscribers who have not given their consent. The new proposal adds a necessary degree of harmonisation for the benefit of the EU's internal market.

With regard to the international dimension, the safe harbour agreement provides data protection safeguards in relation to transfers of personal data from the EU to the US, and therefore has no direct bearing on the actual sending of unsolicited e-mails for commercial purposes from the US to the EU. For such e-mails, US based senders must comply with EU law regardless of whether they are in the safe harbour or not. The EU has the right to enforce its data protection law within its own territory (acknowledged under GATS) also with regard to e-mails originating in third countries. The safe harbour is relevant for the transfer of e-mail address lists from the EU to the US. However, an EU based data processor must comply with EU law and could therefore only transfer an opt-in list

TACD RECOMMENDATION ON LINKING

The Internet's World Wide Web is designed so that persons can point to information, using a Universal Resource Locator, commonly referred to as a URL. Pointing to a resource on the Internet is sometimes referred to as "linking." It is common for web pages to link to other resources on the web. The technology of the World Wide Web is new. Governments should avoid restrictions on a person's freedom to point to information. The benefits of the free flow of information, including information about where information is located, are great.

EUROPEAN COMMISSION SERVICES' RESPONSE

Linking is what made the Web different from previous Internet applications (telnet, FTP, WAIS). Linking and the graphical browser are the fundamental reason for the WWW's phenomenal success.

Any attempt to inhibit linking should therefore be scrutinised carefully.

The European Commission services take note of the TACD statement on linking and welcomes the demand to keep « linking » in its different forms in general possible and legal.

The « link » is in itself an information. Against this background, the question of linking is closely connected to the issue of liability for information available on the Internet. Liability of intermediary service providers for third party information is addressed in Directive 2000/31/EC¹ on certain legal aspects of e-commerce (Article 12-15).

¹ OJ L178, 17/07/2000, p. 1

TACD RECOMMENDATION ON ICANN

It is the view of TACD that ICANN's mission should be limited so that it does not become a general purpose Internet governance organization.

The records of ICANN should be open to the public, including financial records, and all ICANN contracts and ICANN should be accountable to the public. The public should be given an annual opportunity to review and comment on the ICANN budget. The Budget of ICANN should be subject to review by the countries that provide the ICANN charter. Fees associated with domain registration should only be spent on activities essential to the management of the DNS system.

TACD asks the US and the EU to report on the legal mechanics that will limit ICANN's power to address broad Internet content issues, and insure public accountability.

EUROPEAN COMMISSION SERVICES' RESPONSE

The mission of ICANN is limited. It has been defined by the Articles of Associations and Bylaws agreed upon in November 1998.

According to these statutes, ICANN goal is to promote the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system, including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system.

In addition, ICANN shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

As regards openness and accountability, ICANN is submitted to an independent review policy which has been adopted on 10 March 2000 in order to provide a meaningful check on the powers and actions (or inactions) of the ICANN Board of Directors. An Independent Review Panel will be set up with the mission to compare contested actions of the ICANN Board to the Bylaws and Articles of Incorporation, to declare whether the ICANN Board has acted consistent with the provisions of those documents, and to do so in an open and efficient manner.

For the control of the ICANN budget, a Task Force on Funding has produced a final report with recommendations adopted on 30 October 1999. It has recognized the need to place some meaningful controls on the future size and growth of the ICANN budget. The basis for limiting ICANN's budget is rooted in the notion that ICANN is a limited-purpose technical coordination entity; however, ICANN is likely to come under pressure to expand its reach

into areas outside its narrow mandate. Controls on ICANN's budget are an important safeguard against mission creep and the unrestrained budget bloat that might enable it. Moreover, there is a practical need among the registries and registrars for predictability in ICANN's year-to-year budgets. The registries and registrars must themselves make budgets and business plans that are not vulnerable to significant surprise financial obligations newly imposed by ICANN.

For the future, it is foreseen that ICANN's budget process needs to be improved to give the entities providing the funds -- the domain name and address registries and the gTLD name registrars -- a formal role in the budgeting process. The goal is to acquire greater accountability, predictability, participation, and transparency in the budgeting process. The Task Force recommended that the budget proposed by the President at the outset of the budget process should be directly transmitted via email to each name and address registry and each gTLD name registrar for review and comment, with adequate time for study and response.

The Report also recognized that in addition to the entities directly contributing the funds to ICANN's cost-recovery program, the rest of the ICANN community must have a fair opportunity to review the proposed budget and participate in the consensus-development process. The Task Force recommends that ICANN require that the proposed annual budget to be placed on the agenda for at least one Public Forum prior to adoption.

The Commission will carefully follow the implementation of these recommendations for the next ICANN's budget, covering the fiscal year 2000/2001.

TACD RECOMMENDATION ON JURISDICTION ON CROSS-BORDER CONSUMER CONTRACTS

- 1. The TACD urges the European Commission and governments and the US government, to ensure that the currently negotiated International Convention on jurisdiction and the enforcement of judgements (The Hague Convention) provides the consumer with the right to sue business before the courts of the consumer's country of residence in e-commerce transactions.**
- 2. Furthermore the TACD urges the Council of the European Union to adopt without delay the proposed EC regulation on jurisdiction and the enforcement of judgements in civil and commercial matters.**

EUROPEAN COMMISSION SERVICES' RESPONSE

- The provisions of the draft Hague Convention on jurisdiction which refer to e-commerce have been subject to in-depth discussions in the context of the Hague Conference, namely in the field of consumers contracts. Article 7 para 1 of the preliminary draft concerning contracts concluded by consumers reads:

"A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

 - a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and*
 - b) the consumer has taken the steps necessary for the conclusion of the contract in that State."*

Further work is needed for the drafting of this provision. A specific meeting was held on e-commerce in Ottawa last March.
- The EC draft Regulation on jurisdiction was transmitted in July 1999 to the European Parliament which has not yet adopted an opinion on it. This opinion is expected in September 2000. Following the adoption of this opinion, the Commission will, in principle, present an amended proposal. The Regulation could then be adopted within short period.

TACD RECOMMENDATION ON ALTERNATIVE DISPUTE RESOLUTION IN THE CONTEXT OF ELECTRONIC COMMERCE

ADR systems to resolve consumer complaints in the context of electronic commerce should be based on the following principles.

- 1. The necessary framework and standards for ADR systems should be set by legislation.**
- 2. ADR systems should be easily accessible and convenient. Businesses who participate in such systems should provide links from their Web sites. Governments, consumer organizations, trade associations and others should also provide links to make it easy for consumers to find help. Disputes and responses should be able to be made online as well as offline. "Real time" discussions should be scheduled at the convenience of the parties. Physical or technical barriers to the ease of use for either party should be avoided.**
- 3. Information about the types of disputes handled, the procedures, the costs, the languages that can be accommodated, the basis for decisions (codes of conduct, etc.), the enforceability of decisions, and other details should be provided prominently and clearly.**
- 4. ADR systems should be designed and presented as a voluntary option for consumers, not as a legal or contractual requirement.**
- 5. ADR systems should be free or low-cost. If the consumer is obliged to pay a fee for this service, the other party should refund the cost if the consumer prevails.**
- 6. ADR systems should be independent. They should be operated by reputable third parties, which could include government, nonprofit organizations, for-profit entities that are not directly involved in the disputes, or any combination thereof. If ADR systems are offered by trade associations or other industry groups, they should be separate and independent, and operate in consultation with consumer organizations. ADR personnel should have no direct interests in the disputes or the parties involved. If funding for ADR systems comes from the business sector, that commitment should be honoured regardless of the decisions that are rendered.**
- 7. ADR personnel should be trained both in basic legal concepts and in mediation skills. If it is a collegiate body that will consider the dispute, equal representation should be given to consumers and businesses. If one individual will consider the complaint, both disputants should be consulted in selecting that person, or the person should have been previously appointed by consumers and industry together.**
- 8. ADR systems should handle complaints in an expeditious manner. There should be reasonable time limits set for considering disputes, rendering decisions, and complying with decisions. If the parties are allowed to submit or ask to share documents or other evidence prior to the dispute being considered, there should be reasonable time limits set for that process.**

9. **ADR systems should treat the parties equitably and fairly. While the parties should have the right to advice from legal counsel or others, the parties should represent themselves in the proceedings. If necessary, ADR systems should provide for translation or outside expertise.**
10. **Decisions on behalf of consumers should be binding on the other party, except that appeals could be made on grounds of mathematical mistake or other technical problems. Meaningful enforcement of decisions rendered through ADR is essential. If ADR systems are operated by trade associations or other industry groups to which companies belong, compliance with ADR decisions should be a requirement for maintaining membership. Failure to comply with ADR decisions should also be a basis for those who facilitate the vendor's sales, such as online auction sites, operators of billing systems, etc. to deny future services to the seller. In addition, governments should adopt and, to the extent possible, harmonize legal frameworks to make ADR decisions in favor of consumers enforceable. Consumers should have the choice of enforcing ADR decisions through the legal framework of either their or the vendors' countries.**
11. **Consumers who submit disputes to ADR systems should not be asked to waive their legal rights, nor should they be restricted or blocked from resorting to other avenues of recourse that would normally be available if they are not satisfied with the outcome. Furthermore, consumers' use of ADR systems should not prevent law enforcement authorities, code enforcers, or others representing consumers' interests from using their cases in actions to stop fraud or abuse.**
12. **In order to ensure that patterns of abuse do not escape the notice of legal authorities or relevant code enforcers, ADR systems should report all cases to a central clearinghouse from which that information would be accessible.**

In consideration of the special and complex issues raised by cross-border electronic commerce disputes, further work will be necessary to develop specific guidelines for how ADR systems should be designed to provide the most efficient and effective redress for consumers.

EUROPEAN COMMISSION SERVICES' RESPONSE

The Issue

A distinguishing feature of e-commerce is that it allows easy access to non-national markets. Significant growth has been forecast in the business to consumer sector and there is promise of many potential benefits for all. This will inevitably lead to an increase in cross border consumption and thus the likelihood of cross border disputes. In order to promote confidence in this new transactional medium it is necessary to ensure that if things go wrong a consumer can seek redress.

There are two aspects to this issue of access to Justice. On one hand the right to seek redress through the courts is a fundamental right for consumers, recognised by the Treaty. The Community therefore has an obligation to ensure that the right to access courts can effectively be exercised.

On the other hand, the Commission services recognise that other mechanisms may be more appropriate and effective in settling consumer disputes at an earlier stage. Most consumer disputes, in particular those involving e-commerce, are usually characterised by the fact that the goods or services have a low economic value compared to the costs of seeking a judicial settlement. This is true at national level but is accentuated in cross border cases. Alternative Dispute Resolution (or 'ADR') offers users the potential for simple, swift and inexpensive redress. Unlike traditional court action ADR aims to provide an affordable mechanism to solve disputes, a quicker solution to bring an answer to a dispute, a flexible mechanism not burdened by complex procedure that allows greater discretion for the decision-maker and overcomes many of the difficulties associated with enforcement. The increase in e-commerce business to consumer transactions will make ADR a more practical and effective option for resolving disputes. In addition it will be an important confidence building factor for consumers and enable business to avoid the risks associated with court action.

The so-called "exhaustion principal" principle for ADR's requires that a consumer should exhaust all ADR remedies before being allowed to start court action. Apart from legality considerations, the Commission does not support this principle as being susceptible to undermine consumer confidence. The consumer's adherence to an ADR system should remain voluntary and not being subject to a legal obligation.

Status

In 1998 the Commission adopted a Communication on Access to Justice that included a Recommendation on the principles applicable to out-of-court procedures for the settlement of consumer disputes¹. This established a number of minimum guarantees that ADR bodies should offer to their users. The minimum guarantees take the form of seven "principles" with which the out of court bodies should comply. These include independence, transparency, Adversarial principle, effectiveness, legality, liberty and representation. Compliance with these principles is intended to guarantee both consumers and traders that their cases will be treated with rigour, fairness and independence.

These principles are limited to ADR mechanisms that have procedures whereby an active third party intervenes to impose or propose a formal solution to settle the dispute. An obvious example of this is where an arbitrator makes a formal award to one of the parties after hearing evidence from both parties. However a body that has procedures that merely involve bringing the parties together to find a solution by common consent are not covered by this Recommendation. Thus they are not required to apply its principles. An example of this procedure is 'mediation'. A mediator, a neutral third party, will attempt to establish direct communication between the parties and work towards a compromise solution having examined the parties' point of view, worked with them to identify disagreements, and taken into account their respective interests. The Council has invited the Commission to consider further criteria for bodies that fall outside its scope².

Member States agreed to notify the Commission of the main particulars of those bodies that they deem to be in full conformity with the principles. The notified bodies are listed on the web site of Directorate-General Health and Consumer Protection.

¹ 98/257/EC *Official Journal* L115/31, 17.04.98, p.1-16

² Draft Council Resolution on a Community Wide network of national bodies for the extra-judicial settlement of consumer disputes. CONSOM 22, 7508/00

With the importance of ADR gaining prominence a number of initiatives, building on this recommendation, are being pursued (what follows is a non-exhaustive list):

European Extra-Judicial Network (EEJ-Net)

This is a natural continuation of notification under the Recommendation and is intended to primarily utilise all existing European out-of-court consumer dispute resolution schemes. A single contact point (or 'Clearing House') will be established in each Member State which the consumer can contact, in the event of a dispute with an enterprise, for information and support on making a claim to an out-of-court dispute resolution system in the place where the business is located. The EEJ-Net will thus be a communication and support mechanism allowing consumers easier and practical access to an ADR situated in another countries.

The EEJ-Net does not seek to harmonise procedures at a national level. It will be an evolving and flexible structure that will accommodate new schemes (including on-line) and take advantage of new technological communication methods. Incorporation into the network will therefore facilitate easy access and awareness for consumers.

Financial services

Complementary to the EEJ-Net, Directorate-General Internal Market are launching an initiative to institute cross border co-operation between national redress schemes in the area of financial services. This co-operation will create a sectorial complaint network that will cover the provision of both on-line and off-line financial services.

JRC Study and Workshop

Directorate-General Information Society asked the Joint Research Centre to carry out a study to examine the legal, and especially the technical, requirements for implementing business-to-consumer on-line dispute settlement systems as a measure to improve consumer trust in e-commerce. The study is designed to assist Directorate-General Information Society in targeting research projects in this area under the IST Programme, and in particular the deployment of pilot projects.

The results of this exploratory study were presented at a Workshop on 21st March 2000. Industry, consumer groups, legal experts and academics attended the workshop, to discuss the specific needs of on-line dispute settlement systems, the legal, practical and technical implications. The final report will be published in due course and a website, an *e-confidence forum*, will be established to create a platform for the exchange of ideas.

Research Projects

We are hoping that several proposals for pilot projects in this area will come forward under the current IST programme call for proposals Key Action II "New Methods of Work and Electronic Commerce".

Depending upon proposals submitted by industry and consumer organisations, pilot projects, working groups, and best practice experiments are expected to be launched during 2000, addressing online dispute resolution, trust marks, and consumer complaint facilities. Already financial support has been provide to the Webtrader scheme to establish an on-line

certification and ADR schemes in several member states and to ECODIR (Electronic Consumer Dispute Resolution System) who intend to establish a pan-European on-line ADR mechanism based on the Canadian model of *Cybertribunal.org*.

Codes of conduct

Market based solutions, developed in respect of the legal framework, are effective to address consumer confidence. Codes of conduct, trust seals and ADRs could be such solutions. Each one of them should not, however, be viewed in isolation but as part of an integrated system to ensure consumer confidence. In particular, codes of conduct are effective in encouraging best business practices with respect to all aspects of a transaction. Trust seals provide consumers with an easily recognisable symbol certifying their adherence in a code of conduct. ADRs can be effective mechanisms to address dispute resolution, well adapted to the small economic value of e-commerce transactions.

A number of such initiatives already exist at European and national level. In order to address the risk of confusion for consumers arising from a proliferation of such initiatives which are not always of the same quality, the Commission is currently 'facilitating' the work of a group of stakeholders (consumer and business representatives) to establish a set of minimum standards for codes of conduct, trust marks and ADR's. An accreditation procedure and a seal attribution will be established for codes of conduct trust marks and ADRs complying with these principles. The Commission is considering ways to endorse the outcome of this process, possibly through a Recommendation.

Alternative dispute methods

On 29 May 2000, the Council of Ministers for Justice and Home Affairs agreed on a working method to enable useful concrete results to be achieved in the area of alternative methods of settling disputes under civil and commercial matters.

The scope of these Council conclusions is broader than alternative resolution of consumer disputes in the context of electronic commerce, since it also covers consumer disputes in the "off-line" context, commercial disputes, family litigation, etc.

The conclusions suggest that "the existing situation in the Community Member States should be studied, focusing on extrajudicial means of settling disputes other than arbitration. This study should take into account work already envisaged or under way at the Community level, particularly in the consumer field. (...) On the basis of the information obtained, the Commission is invited to draw up and present, during 2001 at the latest, a Green Paper taking stock of the existing situation and initiating wide-ranging consultation so that any measures to be taken can be prepared. Priority should be given to the possibility of establishing basic principles, either in general or in specific area, which offer necessary guarantees to ensure that the settlement of disputes by extrajudicial bodies enjoys the degree of reliability which the administration of justice requires.

Following these Council conclusions, the Commission has started its work and may present its Green Paper in October 2001.

Conclusion

The Commission services agree with the TACD as regards the benefits of ADR. It also recognises the potential risks. This is exactly the reason why ADR-systems should meet certain criteria and respect basic principles. The principles of the Commission's Recommendation aim at avoiding the potential negative impacts highlighted by the TACD. (In some respects, the Recommendation is tougher than the TACD resolution).

Over and above the principles set out in the Recommendation, ADR for electronic commerce should use technology innovatively, so that the schemes can also operate online. In principle it would appear logical that a consumer willing to buy on line and a business willing to sell on-line, should both be prepared to use also the same on-line approach for settling disputes.

The development, promotion and encouragement of ADR must be a joint effort between all stakeholders. Consumer groups have a role to play in the creation of ADR schemes, together with industry, trade associations and where necessary, government.

TACD RECOMMENDATION ON SAFE HARBOR NEGOTIATIONS

- 1. The TACD urges the U.S. Department of Commerce to incorporate the comments submitted on December 3 and to implement the suggestions for mandatory registration and systematic auditing. As it currently stands, the proposal subverts the purpose of the EU Data Directive and compromises the privacy interests of European citizens. Furthermore, the TACD should be given an opportunity to comment on the next draft of the Safe Harbor proposal before any final decision is made.**
- 2. The TACD urges national governments to ensure that consumer organizations are given a more central role the future development of international privacy policies and practices that affect consumer interests.**
- 3. The TACD urges 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.**
- 4. The TACD urges the United States to immediately draft and adopt comprehensive privacy legislation that conforms to the protections of the EU Data Protection Directive. Such legislation would protect US citizens and those of other countries doing business in the US.**
- 5. The TACD urges all US agencies negotiating over or with jurisdiction on consumer privacy protection to adopt the 1980 Organization for Economic Cooperation and Development (OECD) Privacy Guidelines (available at <http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM>) as the proper framework and structure for adequate privacy protection. These guidelines were adopted by the United States in 1980 and continue to serve as a robust model for guarding consumer privacy.**

EUROPEAN COMMISSION SERVICES' RESPONSE

We are grateful for the TACD's continued interest and input to the informal dialogue on data protection and recognise that the TACD recommendations are extremely pertinent. Throughout the discussion the Commission has striven to accommodate similar concerns. We hope that the final version of the Safe harbor documents as approved by the Commission on 26th July will meet with the TACD's approval .

With regard to some specific recommendations contained in the Statement, we would like to draw your attention to the following:

Individual Complaints: If an individual is not satisfied with the response that the alternative resolution body has given and believes that the Safe harbor principles have been violated, he or she can address himself/herself to the FTC, or – perhaps more likely in practice – to his/her national or regional data protection authority. Although it is correct to say that the FTC has no obligation to follow up all individual complaints and does not as a matter of practice do so, the FTC has undertaken (see paragraph 4 of FAQ 11) to review on a priority basis privacy

cases referred to it by self regulatory organizations, such as BBBOnline and TRUSTe, and by the national data protection authorities of EU member countries alleging non-compliance with the safe harbor principles, to determine whether Section 5 of the FTC Act prohibiting unfair or deceptive acts or practices in commerce has been violated. If the FTC concludes that it has reasons to believe Section 5 has been violated, it may resolve the matter by seeking an administrative cease and desist order prohibiting the challenged practices by filing a complaint in a federal district court, which if successful could result in a federal court order to the same effect. The FTC will notify the Department of Commerce of any such actions it takes.

Furthermore on Article 2 of the draft Commission decision provides safeguards which will allow Member States to suspend data flows under certain closely defined circumstances, which will ensure that personal data does not continue to flow across the Atlantic if serious problems regarding compliance or enforcement have been identified.

Self-certification and registration: We do not consider self-certification as a shortcoming, but a normal part of a self-regulatory system. As far as mandatory registration of companies adhering to the Safe harbor is concerned, paragraph 4 of the introduction to the Safe harbor principles specifically states that Safe harbor benefits can only be ensured from the date on which each organization wishing to qualify self-certifies to the Department of Commerce (or its designee) its adherence to the principles in accordance with the guidance set forth in the Frequently Asked Question 6 on Self Certification. The FAQ in question further details what type of information must be made available. The Department of Commerce will maintain a list on the basis of the information it receives which will be open to anybody to consult. Moreover the Department of Commerce has undertaken to indicate on the list it maintains of organizations self certifying adherence to the safe harbor principles, any notification it receives of persistent failure to comply, whether it is received from the organization itself, a self regulatory body, or from a government body. The list should thus be a transparent and up-to-date means of verifying which companies are entitled to Safe harbour benefits.

Prior and periodic reviews of compliance: The TACD points out that there is no independent review process to assess compliance with the principles before registration is allowed and the Safe harbor benefits are granted. It is true that independent verification is not compulsory. However, both prior and periodic checks are likely to be carried out for a substantial proportion of organisations adhering to the Safe Harbor, notably those that join privacy programmes such as those organised by BBB On Line and TRUSTe. It is nevertheless fair to say that enforcement of the Safe harbor principles will be complaint driven, but this is also the case for the Directive.

Choice and Onward transfers: Concerning the right of individuals to control to whom their data is forwarded, it should be noted that they have a right to opt out of the disclosure of their personal information to third parties. The only instance where data can be passed on to a third party without the individual's consent is when it is forwarded to an agent acting on behalf of the "harborite" and that has subscribed at least to the same level of privacy protection as is required by the Principles relevant to the specific transfer. In the case of sensitive information, however, individuals must be given explicit opt in choice every time their information is disclosed to a third party. The definition of sensitive data echoes to a large extent that of Article 8 of the EU directive.

Finally we very much agree with the TACD stance that the 1980 OECD guidelines constitute an appropriate reference point and a robust model for safeguarding privacy and are grateful for the TACD's continued interest in the Safe harbour which hopefully will continue throughout the implementation phase.

TACD RECOMMENDATION ON E-COMMERCE AND CHILDREN

The United States and the European Union should develop appropriate and effective policies to govern online marketing and sales transactions targeted at children. Given the rapid development of these practices, we urge governments to adopt such policies as quickly as possible.

EUROPEAN COMMISSION RESPONSE

The services of the European Commission recognise that children fall under the category of vulnerable consumers. The protection of their interests merits special attention.

This is inter alia recognised by the OECD guidelines on consumer protection and electronic commerce. Over and above the generally applicable principles of consumer policy, the OECD guidelines stress that businesses should take special care in advertising or marketing that is targeted to children, the elderly, the seriously ill and others who may not have the capacity to fully understand the information with which they are presented.

The services of the European Commission support the initiative of the Consumers' Committee to organise 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 services of 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 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 in which the European Consumers' Organisations are represented. On the industry side, the European Advertising Tripartite has been appointed as its representative in the dialogue. The European Commission expects that the first conclusions of the dialogue can be reached within 2000.