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Will Electronic Commerce Change the Law?

Towards a Regulatory Perspective Based on Competition, Information and Learning Skills

I will not attempt, in this paper, to analyse the proposals currently under discussion regarding the regulation of e-commerce^{N1}. My purpose is rather to examine the consequences of these proposals for the vision that we generally have about regulation; that is, the rules that are adopted by authorities to ensure compatibility of economic activities with social values. The perspective should help us understand how, and to what extent, regulation is being affected by the information society.

A Confrontation Among Actors

The basic idea is that human attitudes change with the information age. Our perspective has been influenced over a long period by an 'industrial' vision. Industrialisation is generally associated with labour and production organisation. However, industrialism also affected the law—the mechanisms which were used to ensure compliance with social values. The industrial vision of the law appears to be based on a 'macro-legal' attitude, where regulation is seen as (i) a set of normative principles (ii) imposed by an authority and (iii) expressing a project that members of

society are to implement under a threat of penalty.

That vision has led to a systematic confrontation among economic and social actors. One example may be taken from discussions surrounding e-commerce regulation^{N2}. In this debate, two positions are generally opposed^{N3}.

Firstly, the position adopted by businesses. As we know, businesses endeavour to minimise costs and maximise benefits. Such attitude is said to be necessary, as customers are to be attracted if undertakings want to collect resources for survival and future development. In that context, regulations are regarded as burdens. As a result of the law, undertakings are to commit resources to behaviour

they would not otherwise have contemplated (for example, the protection of personal information on customers). The rules also prevent them from engaging in activities that might have proven profitable (for example, the installation of electronic devices in software in order to monitor customer behaviour and gather marketing information).

Secondly, the position adopted by customers. Cost minimising and profit maximising are not limited to businesses. Such behaviour may also be found with customers. The pattern will however be different, as an action bringing a benefit to an undertaking will often imply a cost for customers (and vice versa)^{N4}. By customers, rules are generally

^{N1} For a global overview of the telecommunications regulation in force in Europe, including aspects of Internet regulation, see NHOUL P., *Droit européen des télécommunications—L'organisation des marchés*, Bruxelles, Larcier, 1999. For a similar study on US law, see BENKLER Y., *Rules of the Road for the Information Superhighway: Electronic Communications and the Law*, Saint Paul (Minn.), West Publishing, 1996.

^{N2} For an excellent presentation of the discussion related to that subject matter, see the first issue of the new review *Info—The Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media*, published by The Camford Group and endorsed by the International Telecommunications Society as its membership journal.

^{N3} This presentation is simplified for the sake of clarity. Groups are not as homogenous as one may think. For instance, the rules of privacy protection may be considered as a burden by consumers who might prefer a simpler—hence cheaper—treatment, contrary to what is generally suggested. Some businesses might also consider these rules as a source of profit. That is the case for the undertakings which make their business of rating the policy adopted by e-commerce companies with regard to privacy. Furthermore, and assuming that groups are rather homogenous, the status of the rule among businesses and consumers often depends on its content. For instance, many e-commerce businesses will consider the rules on privacy as constraints, but they will have a different view with respect to the rules protecting their intellectual property. Such rules will then be considered as absolutely necessary, even though they may place a constraint on the behaviour to be adopted by other economic agents—in this case the customers. Similarly, rules may be considered positive by customers with respect to the protection of privacy, while some customers will complain about the intellectual property rules which, they say, prohibit the free circulation of ideas and art.

^{N4} A decrease in price will often be regarded as positive by the customers, but rarely by undertakings as it will imply a profit lower than would otherwise have been attained. By contrast, higher prices for a good or a service will require a larger share of the customer purchasing power to be affected to the operation, whereas it will mean a bigger profit for the undertaking.

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regarded as remedies—not burdens. They are supposed to provide a protection against risks^{N5}.

As we see, different solutions may be adopted in various situations. These solutions are decided upon by authorities^{N6}. The latter are supposed to occupy a central position in society. Most of them are elected, or are at least submitted to some form of (sometimes indirect) electoral control. For that reason (and probably others as well), they may be sensitive to the concerns shared by the consumers.

It has long been recognised, however, that electoral results do not only depend on the behaviour of the citizens. Money is essential in that market too. The marketing activity which is related to elections depends to a substantial extent upon the sum collected by the candidates. In many instances, the electoral money is handed over by corporations. It is thus essential for authorities and politicians in general to be sensitive as well to the ideas—and suggestions—put forward by the undertakings^{N7}.

The Political Process

On the basis of these remarks, a general presentation may be proposed of the regulatory process as it is analysed by many observers.

- In *economic* terms, rules may be said to provide a tool for the allocation of costs and benefits among social and economic forces. Take the discussions on the allocation of damages caused by illicit information posted on the Web. Various solutions may be contemplated by law makers. The damages can be imposed on the victim, by deciding that no reparation will be granted. A payment may also be requested from the service provider, or from other intermediaries (firm providing storing facilities, etc.). The choice in favour of one option will determine who will pay the costs associated with the activity.
- The regulatory process may be described in *political* terms as a struggle to obtain legal protection. Interest groups are aware of the prevalence that may be given by the law to their position. That prevalence means that their position will be accepted, and defended with the authority of the state, as long as other groups are not in a position to articulate a coherent counter-proposal and mobilise social forces

to have that proposal adopted by the legitimate representatives.

The struggle appears clearly in many economic areas. See for instance the discussions which oppose undertakings for the adoption of technical standards^{N8}. The attitude adopted by undertakings may easily be understood. The ‘winner’—that is, the undertaking whose innovation will be regarded as the standard—will receive payments from intellectual property rights licences^{N9}. It will also be placed in an excellent position to undertake research and development for related innovations. Finally, it will command the know-how necessary to manufacture the goods and services related to that standard.

A Locked Society?

These comments have led many observers to consider that our society is somehow locked. Parties are trying to obtain legal or economic advantages to the detriment of others, with the result that satisfactory compromises are rarely attained.

A good example of that situation may be found in the discussions that have taken place in Europe with respect to the universal service in the telecommunications industry¹⁰. As we know, that sector was reserved for decades to national monopolies. With the advent of competition, authorities wondered about the implementation of the political objectives which were pursued under the former regime, in particular the broad dissemination of telecommunications goods and services throughout the population and the territory^{N11}. They decided that political actions should be undertaken apart from competition.

The question was however to determine who would pay the costs associated with the universal service. The new entrants were rather opposed to a substantial public intervention. They feared that the costs would be imposed on undertakings, including themselves. Their concern was that they would then be hampered in their ability to compete—enter markets dominated by former operators and innovate to develop new services/technologies.

By contrast, the former telecommunications operators supported a large version of the universal service. Due to their command of the public network, they were the only ones able to perform the relevant services. For that reason, they were sure to be entrusted with the exclusive responsibility for the programme. They would thus be protected from competition on these markets and receive a remuneration which would compensate their relative inefficiency in other fields as well.

The position advocated by the former telecommunications operators was supported to some extent by certain consumer groups. The latter have traditionally been wary of changes coupled with competition. They hope that prices will decrease as a result of a change in the market organisation. At the same time, they are concerned that undertakings might be forced to cheat in a competitive environment; that is, to grab resources from customers while providing little to them.

The debate led the Member States to discuss an amendment to the EC Treaty during the Amsterdam inter-governmental conference. The partisans of both attitudes submitted proposals supporting their stance. A

^{N5} Let us suppose a customer wants to underwrite securities via the Internet. Several techniques may be used to that effect. One of them is to transfer funds from a bank account to another one—that of the undertaking issuing the securities. Such operation implies risks. For instance, a third party may intercept the code used to open the electronic account and later use that code fraudulently. The undertaking issuing the securities might also behave dishonestly and, for example, not deliver value in return for the funds transferred to it. These risks may be allocated by the law among the parties involved. Thus, the legislator may decide that the loss will be compensated by a special fund created to support electronic transactions. It may also consider that as a specialised institution, the customer's bank should have made sure the code would not be intercepted.

^{N6} The authority has been identified with the term *legislator*, but may receive a different name in other legal systems.

^{N7} Businesses also have an influence on politicians via the information they are able to collect, and the intelligence they are in a position to produce and disseminate.

^{N8} For example, the standard for the third-generation of mobile telephones.

^{N9} The good or service may only be used and/or produced if the other undertakings resort to the intellectual property rights which are associated with the innovation.

^{N10} See NIHOUL P., *Les services d'intérêt général dans le traité d'Amsterdam, 1998*, in LEJEUNE, Y. (ed.), *Le traité d'Amsterdam: espoirs et déceptions*, Bruxelles, Bruylant, 341 s.

^{N11} About the European rules on universal service, see NIHOUL P., *Droit européen des télécommunications—L'organisation des marchés*, Bruxelles, Larcier, 1999, 273 s.

compromise was reached for a new provision to be inserted in the Treaty. That provision, however, is hardly legible. It contains a summary of the positions expressed by the parties, without clear indication as to the option which was finally chosen. All parties were thus in a position to claim victory. The confrontation was not resolved, and is likely to occur whenever the question is asked again^{N12}.

Rules With Various Origins

Rules created by authorities

As was said at the outset of this paper, the regulation that we experience nowadays in many sectors of the economy is inspired by an industrial vision. In many respects, industrialisation is accompanied by some sort of centralisation. With industrialisation, workers gathered from villages to urban centres. Their work was organised as the implementation by many of tasks determined by a few. Such economic and social concentration found an echo in political organisations, with large territories being administered from a single place^{N13}. In that organisation, the law was no exception. As observed above, the legal system was regarded as a body of binding sentences expressing a project designed by a central authority. That project was supposed to become reality; that is, to be implemented by the members of society under the threat of sanction.

Compared with that organisation, a change is under way with the development of the information society. The latter does not imply, nor rest upon, a centralisation of power. It may rather be associated with a dispersion or dissemination of power. We are witnessing the possibility of workers performing duties away from traditional professional premises. Workers are increasingly independent, as their task implies the creation of value away from a mere implementation. The political power is also affected by the evolution: it is progressively devoluted to entities closer to the citizens, both at national and international levels.

May conclusions be drawn from that evolution with regard to regulation? May we still consider that the law—and the regulatory tools—are created principally, if not exclusively, by public authorities^{N14}? Or are we in a position to consider alternative sources of regulation, which may gain momentum with the information society? That perspective is essential

for the development of future regulatory tools to be used in the information society. It is also important for the democracy, as the latter implies (and presupposes) the possibility for citizens to participate in the ‘norm making process’.

To me, a positive answer must be given to the question. Rules are not—and should not be—created in an exclusive manner by authorities. Research is only starting in that direction, but it is essential to demonstrate that new areas are progressively discovered in that field. In this paper, three sorts of project will be shortly introduced with an emphasis on the last one.

Rules created by communities

Rules are created by communities, apart from those which are adopted by authorities. Seminal reflections may be found in that regard in the works written by Yale Law Professor Robert C. Ellickson^{N15}. These works are based on a study related to a small farming community in the United States. The objective was to identify how the members of that community resolve their conflicts; that is, to determine what regulation was used in order to manage their sometimes conflicting interests. Surprisingly, Prof. Ellickson found that most of the time parties did not resolve conflicts using the laws enacted by the local and/or the federal government. They rather referred to norms which had progressively developed in their community and which remained unaffected by the official legal production.

The works initiated by Prof. Ellickson were continued in other projects. It was essential indeed to determine whether the pattern

observed in a farming community could be found in other, probably more sophisticated, circles, such as those formed by businesses in the modern economic world.

A project of that kind is currently undertaken with respect to the Internet in the Berkman Center for Law and Society, at Harvard Law School. In that project, Professor Larry Lessig regards electronic software as a sort of legal code. That code is to be used by the Internet members to reach the goal they are pursuing—realise a given operation, attract customers, etc.^{N16}

Another legal scholar, New York Associate Professor Yochai Benkler, looks at the impact of technical choices on behaviour^{N17}. For him, the Internet is to be regarded as a medium which allows virtually everyone to post creations on the Web. By contrast, creation is severely restricted, when it comes to television, to some entities or people—basically those which can collect funds necessary to finance televisual content. For Benkler, the choice in favour of one or the other media has an impact on democracy, as it determines the ability to participate in the creation and dissemination of ideas^{N18}.

Rules created by individuals

Another research direction is related to the rules which are created by individuals, or by entities. In the industrial vision, society is regarded as homogenous. On one side are public authorities, which enact rules supposed to govern society. On the other side are the members of society, which are expected to abide with instructions given by public authorities. Non-compliance implies a penalty, as the objective is to ensure

^{N12} On the subject matter, see a. o. DEHOUSSE, F. and VAN DEN HENDE, L., *La place des services publics dans la conférence intergouvernementale, 1997*, in *Les services publics et l'Europe : entre concurrence et droit des usagers*, Actes du colloque organisé par l'Institut d'études européennes, le Centre de droit public et la Maîtrise en management public, 13-14 Décembre 1996, Université libre de Bruxelles, 37.

^{N13} That was the case in France, Germany, and the United Kingdom.

^{N14} The question is thus not related to the determination of the entities (businesses, authorities, etc.) which should set the rules, as is often the case in discussions concerning e-commerce regulation. It is rather to identify sources of normativity, by trying to determine who sets in effect the rules that are abided with by the actors.

^{N15} ELLICKSON, R. C. *Order without Law—How Neighbors Settle Disputes*, Cambridge (Mass.), Harvard University Press, 1991.

^{N16} A description of the work which is performed in the programme is available at cyber@law.harvard.edu.

^{N17} See a. o. BENKLER, J. *Communications Infrastructure Regulation and The Distribution of Control over Content*, 1998, in BLACKMAN, C. and NIHOUL, P. (ed.), *Convergence between Telecommunications and Other Media: How Should Regulation Adapt?*, *Telecommunications Policy*, special issue, 183 s.

^{N18} The choice is realised by authorities, which may encourage the development of one or the other technique. It also depends upon the community as a whole—the innovations which are made by its members and the kind of technology which is supported by the latter.

a homogenous behaviour—that which is deemed appropriate by authorities.

That representation corresponds with the perspective adopted by the authorities. In that context, regulation is seen as a project designed by authorities for society. People—who are affected by regulation—have no existence on their own. They constitute mere tools for the realisation of the public project. Thus, the industrial vision conforms in many respect with a centralised version of the regulatory phenomenon^{N19}.

Yet, the information society is characterised by a movement to the contrary. Rather than concentrating, it expands organisations in space and volume. With the information society, the economy, the labour and the political process appear to move away from concentration towards decentralisation. That evolution commands for the study of regulation a perspective not restricted to authorities but rather based on the views adopted by the people.

In that regard, it is essential to set aside the classical tradition in legal analysis, where rules are analysed from the authorities' perspective. A research project is currently taking place at The Telecom Unit^{N20} in that direction. Our focus is placed on the process whereby individuals and entities forge their own rules on the basis of a variety of external influences, including: social pressure, threat of sanction, etc. The scheme is based on an ordinary question: 'Who really makes the law?' Concededly, public authorities adopt propositions which pretend to govern behaviour. However, the real law maker appears to be located elsewhere. Nobody can really be forced to obey the law. If he/she does not want to, he/she will always find a mechanism which will allow him/her to bypass the law—legally or not.

In that context, the ones who really make the law are not public authorities: it is the addressee which confers obligatory character to regulation by accepting and/or deciding to modify his/her behaviour in a way compatible with the rule.

Rules created by economic interactions

More concrete examples are available in the third direction which I would like to present in this paper. That third category is related to interactions among society members—business interactions in this case. The analysis is based on an example concerning competition regulation. European states now have competition laws

similar or analogous to those embodied in the European Treaty (prohibition of cartels and dominant position abuses). Prior to that stage, most of them had other rules, which were said to promote 'fair competition'. Both bodies of regulation contained in effect the same kind of prohibitions, with differences as to modalities.

The example focuses on one practice considered illegal under both sets of rules: the refusal to supply a good/service if the customer does not agree to acquire another—related or not—market (tying-in). Under the rules of unfair competition, that practice was prohibited in all circumstances. The approach is different with the rules of competition, where the prohibition is only directed against dominant firms adopting that behaviour. The reason underlying that latter approach may be described as follows.

- In normal circumstances, a customer may change supplier if he/she is not satisfied—for instance if he/she is confronted with tying-in practices. An economic pressure is then placed on the supplier to change its behaviour, or face the departure of dissatisfied customers. No specific rule appears to be necessary to bring

about a change in behaviour on the part of the supplier.

- The mechanism will only be effective if the customer can change supplier, should he/she be dissatisfied. That possibility is seriously hampered in cases where the supplier holds market power. The concept describes a situation where the undertaking can behave independently of the markets. It does not have to take into account the possible reactions of dissatisfied customers nor those of competitors, who are in effect unable to attract customers.^{N21}

Under both sets of regulation, a negative consequence is attached to a specific behaviour. It is hoped that this consequence will force the undertaking to change behaviour. The only difference is related to the nature of the sanction (Table 1). In one case (absence of market power under competition rules), an economic sanction is applied by business actors (change of supplier). In the other ones (fair competition and presence of market power under competition rules), the sanction is applied by an authority and takes the form of a civil and/or criminal penalty.

Table 1

	Former Rules on Competition	Present Rules of Competition
Attitude vis-à-vis tying-in	Tying-in is prohibited in all situations	Tying-in is prohibited where the firm holds market power, and only discouraged in other circumstances ^{N22}
Sanction	A criminal and civil penalty is imposed	A criminal and civil penalty is imposed where the firm holds market power; the firm suffers a decrease in market share in other circumstances ^{N23}
Reason for which a sanction is imposed	1. The hope is that tying-in will be dropped by the firm as a result of the imposition of the sanction. 2. It is even hoped that the practice will be dropped before the sanction is imposed (anticipation of the sanction on the part of the firm).	1. and 2. : <i>idem</i>

^{N19} In that context it comes as no surprise that the legal profession has been articulated around activities carried out by authorities. Some legally educated people work for institutions. In that capacity, they contribute to a definition of the project by public authorities. Others work in the private sphere. Their job is then aimed at trying to anticipate the decisions of authorities in order to counsel clients on how to implement their strategies without impairing the implementation of that project.

^{N20} The Telecom Unit is a research institute which focuses on issues related to the information society. The emphasis is placed on regulatory issues, examined in an interdisciplinary perspective.

^{N21} That situation may be due to several reasons. Suppose that one firm commands the sole telecommunications (fixed and mobile) infrastructure available in a given territory. Customers have to deal with that firm if they want to use telecommunications services, whatever the conditions imposed by the firm. So it is for competitors who would attempt to enter the market and would be forced to use the infrastructure during a temporary period.

^{N22} In the present competitive world, undertakings are aware of the importance of retaining customers' confidence. Most of them understand that restrictive practices may undermine that confidence. Resorting to, for example, tying-in may cause customers to turn to other suppliers.

^{N23} Customers dissatisfied as a result of the restrictive practice turn to other suppliers.



Figure 1

Changes Related to the Information Age

The Regulatory Mechanism

Let us identify the mechanism underlining the approach in both sets of regulation. Three ingredients may be isolated (Figure 1).

- **Information** In both sets, the purpose is to avoid a behaviour deemed incompatible with social values. To ensure that goal is achieved, information is provided to the potential trespasser: 'Tying-in is not deemed desirable and the company resorting to that practice will face a sanction'^{N24}. In the absence of such information, the behaviour is likely to be adopted as business people may have the impression that their benefits will increase if the customers are forced to buy goods or services they would otherwise have left aside.
- **Learning capacity** Information is not sufficient per se. A change will only occur if the undertaking is able to assess the situation, to understand the necessity of a change and to modify effectively behaviour on the basis of that assessment.
- **Incentive** Another ingredient must be added to information and learning skills, to ensure a change will occur in behaviour. No change will take place if the agent is not encouraged, or pushed, to do so. The incentive may take several forms. In this case, we have examined the incentive which may be derived from the application of a sanction should the criticised behaviour be adopted^{N25}.
- **Information** With the information society, we witness the development of electronic means of storage, analysis and transmission which all affect the volume and quality of available information. These media offer unprecedented manners to influence business behaviour—which is the purpose of regulation. A good example may be taken from the discussion concerning privacy protection for data transmission through the Internet. The proposal put forward by the US administration is to ensure respect of privacy via information provided by rating agencies, that would assess policies enacted by the undertakings which collect information about customers. That proposal appears to provide new regulatory tools which are in complete line with the possibilities opened by the information society.
- **Learning skills** A similar explosion may be witnessed in the capacity of actors—businesses or customers—to use learning capabilities. That development weighs on the design of regulatory tools for the future—especially for those which are related to the information society. The proposal put forward by the US administration, which has been briefly alluded to above, appears to be based on such process. In that proposal, customers may obtain information as to how data concerning their behaviour might be used by companies they are in contact with. On that basis, they may decide to alter their behaviour; for example, break their relation with a company that would not respect privacy.
- **Incentive** An incentive may be found in competition, which dominates the information society. Competition is greatly enhanced by new possibilities for customers to compare offers (monetary union, bargain hunter software, etc.). It is also reinforced by the pace of technology innovation, through which undertakings are forced to offer wider choice to the customers.

Impact of the information age on regulatory mechanism

Here comes the final word of the analysis. The ingredients examined above may be associated to a substantial extent with the information society.

^{N24} As we have seen, the sanction may take the form of a penalty imposed by an authority. In that case, information is provided via the publication of civil or criminal laws. The sanction may also be administered by the customer, who may choose another supplier. The information is then communicated through another channel; for example, business books explaining to would-be managers the importance of customer satisfaction.

^{N25} In that regard, two possibilities have been examined: the imposition of a sanction by an authority or by a customer. In both cases, the incentive take the form of an economic loss should the behaviour be adopted.

Yet, competition acts as a powerful incentive in the business community: it brings increasing wealth to those who can find their way in the business labyrinths (positive incentive), and sanctions to others (negative incentive).

Conclusion

With the information age, we are entering a new stage in society. That development has an impact on regulatory tools available to ensure compatibility of economic activities with social values. Regulation implies the use of information and incentive to obtain changes in behaviour. It also requires learning skills, to ensure effective change in undesired business behaviour. These ingredients are now undergoing major changes: information can be produced, collected and transmitted more easily; with competition, businesses must provide better answers to customers; learning skills ensure that economic objectives and targets are effectively attained. As a result of these changes, we are in a better position to overcome the opposition—traditional in the industrial age—between customers and businesses. That development may offer a model for the solution of other conflicts of interest as well.

Biography



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Paul Nihoul is Director of The Telecom Unit. He holds a Licence in Philosophy/Letters (UCL), a Licence in Law (id.), a Master of Laws (Harvard) and a Doctorate in Law (UCL). He teaches in Belgium (with K. Van Miert), France and The Netherlands. He sits on the Board of Info—the *Journal of the International Telecommunications Society*. Formerly, he was an Attorney (New York, USA), a Counsellor of the Minister of Finance (Belgium) and a Referendaire at the European Court of Justice (Luxembourg). His last book was: *Droit européen des télécommunications—L'organisation des marchés*, Bruxelles, Larcier, 1999, 450 p.