

Self-regulation: Content, Legitimacy and Efficiency - Governance and Ethics

On behalf of IFIP-SIG9.2.2

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Abstract: It is not always easy to speak about ethics in the context of the global information society, at least in some influent circles. People prefer the term 'governance', especially if it is associated with self-regulation. This paper summarises the findings of the analysis of some 40 self-regulation documents, using a standardised grid of analysis, carried out by IFIP-SIG9.2.2 (International Federation for Information Processing, Special Interest Group on Ethics of Computing). These documents include general texts about computing and information systems, both for the public and for professionals. There are also more specialised texts dealing with the Internet, and with specific domains. Among the latter, there are still generic documents, but also approaches by specific sectors. A list of the documents analysed is given in the Annex.

When looking at the different actors, it is clear that the presence of the authorities and of the users is rather weak: it often appears that it is the authors

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of the text who are being protected, rather than anyone else. As far as the content is concerned, most often it does not go further than providing a reminder of what is illegal, and the enumeration of relatively superficial principles of protection. Commitments are 'reasonable' and self-controlled. It seems that a strong lobby of firms engaged in e-commerce is often behind the activity.

Is it satisfactory to advocate self-regulation – the so-called 'more contractual approach between the different parties' – and regret without any further analysis the decline of the State, if the issue at stake is to regulate our society, the information society, what belongs to the common good?

This paper raises questions about the legitimacy of the actors of self-regulation, the limits of the principle of subsidiarity, the conformity of content to higher principles, the capacity of enforcement, the transparency of decision, its efficiency. It seeks to identify the role of self-regulation in the ethical governance of the information society.

Keywords: Internet, Self-regulation, Governance, Regulation, Ethics, Codes, Deontology, Role of the State

1. INTRODUCTION

The interest in the 'deontology of informatics' is surely not the same in the Latin and in the Anglo-Saxon worlds but paradoxically the word is nearly ignored where the practice exists. Although the Council of Europe started its work on the subject in the late '70s, it ended in 1982-83.^v On the other hand, the interest in Codes of Ethics or Codes of Conduct has been proliferating in many Anglo-Saxon computer societies – for instance the Association for Computing Machinery (ACM) since 1966, and the British Computer Society (BCS) in 1968. The Codes of the International Federation for Information Processing (IFIP) Member Societies have been presented elsewhere, and these again revealed to us the predominance of the Anglo-Saxon environment.^{vi}

But this interest is not confined to the ethics of computing. It is also suggested by the number of web sites devoted to 'business ethics',^{vii} 'engineering ethics',^{viii} and 'computer ethics'.^{ix} An international association, INSEIT (International Society for Ethics and Information Technology), was created in 2000, and is led by Deborah Johnson of the University of Virginia. The same creed has spread in the OECD, and in the European Commission, where the term 'self-regulation' has been adopted and is now being promoted. The influence of various business lobbies should be noted. These are being led today by the Global Business Dialogue on electronic commerce (GBDe), which was created, in the spirit of former European Commissioner

Martin Bangemann, to increase cooperation in electronic commerce; we shall come back to this later.⁸

Self-regulation appears to be a form of 'governance' in a continuum termed a 'multi-regulation system' by Michel Vivant when summarising the main ideas of the World Summit for Internet Regulators (Paris, 1999).^{xi} The Harvard Law School's Berkman Center for Internet and Society reminds us, in the presentation of its project 'Open Internet Governance', that the fact that the word 'governance' had begun to appear implied that "users have criticised attempts by traditional governing bodies to regulate the Internet, arguing that such regulation is inconsistent with its 'wild frontier' philosophy and borderless geography." One remembers also the famous statement by Professor Lawrence Lessig, also at Harvard Law School, that "We have no problem of governance in cyberspace. We have problem with governance."^{xii} Self-regulation is just one of the means of this whole process of governance: others could be technical devices, standards, labelling systems, filtering techniques, etc.

The IFIP-Special Interest Group (IFIP-SIG9.2.2), created by the IFIP General Assembly after the study of the Codes of its Member Societies has tackled this new approach. After trying to clarify the main ethical issues that needed to be carefully scrutinised, it has started to examine the meaning and the content of the concept of self-regulation, in the perspective of 'Internet governance'.^{xiii} What we present here is not a state of the art, but a state of the progress of our current work.

2. A TENTATIVE METHODOLOGY

Our search for documents on self-regulation is in a way the fruit of chance. It seems to be impossible to be systematic in this matter. Of course, there are well known documents such as the '10 commandments' of the Computer Ethics Institute of Washington, D.C., Arlene Rinaldi's (and others') rules of netiquette,^{xiv} codes of Internet Service Providers' Associations, like the EuroISPA's codes of conduct.^{xv} There are also documents of a more generic type, such as the French proposal for an Internet Charter - Rules and Courtesies of the Actors of the Internet in France (1997).^{xvi} Organisations have started to collect these diverse instruments (e.g., the European Commission^{xvii}, the OECD^{xviii}), but this is not really a scientific approach. Nevertheless, it is the current status of such projects.

As we were starting the team analysis, we decided to apply a common grid of analysis, such as is usually adopted when analysing legal texts (see figure 1). We identified the people enacting the code, as well as the people concerned (*Ratione personae*), the place where the code is applicable

(*Ratione loci*), the topics which are treated (*Ratione materiae*), the forms of enforcement (sanctions and procedures), and finally a miscellaneous category (*Alia*).

While different people of the SIG9.2.2 team may have interpreted the way of applying this grid in slightly different ways, we feel that the fact that the texts originated from so many different sources that such differences in interpreting the grid could not affect seriously what could emerge from the analysis.

'Ratione personae'/Actors	People enacting (or 'authors') ----- People concerned	
'Ratione loci'/Place		
'Ratione materiae' (Topics and themes)		
Enforcement	Sanctions ----- Procedures	
Alia /Miscellaneous		

Figure 1: Grid of analysis

The act of classifying such documents is itself a problem. We have made a first attempt based on the titles (charter, charta, guidelines, codes,...) or on the persons concerned (individuals, virtual communities, service providers,...), or on the geographical coverage (Chamber of Commerce,...).^{xix} A more satisfactory solution was recently found where we have distinguished the self-regulation documents for 'Informatics in general', on the one hand, from those for the Internet, on the other. In each case, we have also distinguished generic and specific documents. We follow this new classification here; although for the general principles it appeared that there was no need to make a distinction between documents intended for computing and those aimed at the Internet. Regarding IFIP documents, we have merely summarised studies that we have published elsewhere.^{xx} The classification of the documents is given in Annex. The full analysis, according to our grid of analysis (Figure 1), is also available on the web, as well as the URLs where the documents can be found.^{xxi}

3. A FIRST ANALYSIS

3.1 General Documents on Informatics and on the Internet- General Principles

Even the titles of the general documents reveal very clearly their purpose, focussing on their normative character: *10 or 12 commandments* (and in the case of the 10 commandments of the Computer Ethics Institute, the use of the antique form 'Thou shalt' which is normally reserved to worship, referring explicitly to the two tablets of Moses), *7 principles* (CPSR) (because 7 is a perfect number), *10 rules* of netiquette, Charters, Bills of Rights for the citizen,...

Who is enacting these rules and principles? Sometimes it is individuals, but most often groups. There is generally no transparency at all in the way they have been elaborated. Have external people been involved in the process? We also get the impression that the more these documents are declared to be universal, the more they are looking for signatories: this is the case for the Wartburg Charta, the CECUA's Bill of Rights, the CPSR 'One Planet, One Net' 7 principles. They seem to be written for all, i.e. for nobody. In a way, we get the impression that there is a supply, an offer, but where is the demand? Who is really concerned?

The same remark can be made regarding the place where such general principles are applicable: it seems to be everywhere (i.e., nowhere).

As far as topics and themes are concerned, we shall find philosophical concerns such as respect for others, of their work, of their intellectual property. There are also further ergonomic issues involved in the rules of netiquette, and more politically oriented documents (since CECUA and CEPIS declare their intention to advise governments).

3.2 General Documents on Informatics - Specific Principles

As mentioned earlier, the analysis of 31 IFIP Member Societies' Codes covered five main topics^{xxii}:

- *Respectful general attitude*: Respect for the interests or rights of the people involved, for the prestige of the profession, for the interests or rights of the public, for the welfare, health of the public, and for the quality of life;
- *Personal/institutional qualities*: Conscientiousness and honesty, acceptance of responsibility and integrity, respect for requirements or contracts or agreements, conscientious work, professional development and training, competence, effectiveness and work quality;

- *Information Privacy and data integrity*: Confidentiality, privacy in general and respect for property rights;
- *Production and flow of information*: Flow of information to involved parties, information to the public;
- *Attitude towards regulation*: Respect for the code, for the law, and for IT and professional standards.

3.3 Specific Documents on the Internet - Specific Principles

Turning to specific documents focussing on the Internet, in this case the titles do not seem to carry any particular significance. Different terms are used as though they were equivalent: code of ethics, of conduct, of practice, guidelines. The term 'self-regulation' is rarely used explicitly (FSDM-Germany, ISPA-Italy, the Bertelsmann Foundation, the Australian Code for Self-Regulation,...) What seems interesting is a progressive shift from the norm to clauses which look more of a contractual type: the words which are used today tend to be 'Terms of Services', replacing what was formerly called 'Guidelines for Members' (Yahoo-GeoCities, Excite, GlobalOne,...)

The authors of these documents are most often firms and associations of firms (such as associations of service providers). The concept of self-regulation is expanding and becoming more precise as it reaches specific sectors: publicity, telemarketing, software publishers, and even health care. The people addressed by these documents are increasingly considered as clients or customers; people who are hosted by a site are increasingly being requested to conform to norms that are imposed upon them. It is thus worth asking if such documents are still instruments of deontology, or are they just texts designed for the self-protection of those who are writing and enacting them? Some of them are clearly the products of lobbies or pressure groups: these include the Paris Recommendations of the Global Business Dialogue, and the Model Code of the Electronic Commerce Platform-Nederland. As we said earlier, we shall return later to discuss these two cases.

Let us also quote here the Memorandum of the Bertelsmann Foundation, which is now very active in the development of self-regulation of Internet content: "Effective self-regulation requires active consumer and citizen consultation based upon shared responsibility at all stages of development and implementation. Without user involvement, a self-regulatory mechanism will not accurately reflect user needs, will not be effective in delivering the standards it promotes, and will fail to create confidence."^{xiii} We definitely share that opinion, but we dare not to testify that it is the full practice of that Foundation in the projects it supports!

Ratione loci? The place where those texts are applicable is not easy to specify. The associations of service providers are national in scope, and they mainly intend to regulate their national providers. But what about other

service providers which have no national boundaries and which host people from all over the world? These include, for instance, Yahoo-GeoCities, Excite and GlobalOne. Most of the time, disagreements are regulated by local courts, generally in the location of the headquarters of the firm.^{xxiv} These documents are no longer situated 'locally', but 'professionally'. A real question raised here is: Does self-regulation allow us to solve the difficulty (as it is usually described), of the territoriality of the legal systems?

3.3.1 Topics and Themes Covered by the Specific Documents

It is attempting the impossible to try to summarise the topics covered in such a large number of disparate documents. However, if we do not go too far into the details, there are clearly some recurrent themes. Here is an attempt at a summary.

When considering the codes of the associations of service providers (we examined 7 codes from 10 European associations which represented, at the end of 1997, more than 500 service providers – and we added a Canadian code, as a 'control document'), things seem rather clear: 18 themes are mentioned, among which 10 just once.^{xxv}

The most frequent themes are typical for this kind of association (as evidenced by the Australian and New Zealand examples), but also for the service providers who are not 'associated' (Yahoo-GeoCities, Excite) and whose coverage is world-wide:

- All the codes mention their concern about 'illegal material' (child pornography, racism propaganda,...), the necessity of protecting youth, especially against those who exploit their credulity and their commitment to cooperate with hotlines; they also stress their inability to monitor or control all their content.
- The second-most frequent theme (present in seven of the codes examined) is linked to data protection, confidentiality and e-mail secrecy.
- Then comes the need for decency: no violence, no hatred, no cruelty, no incitement to commit crimes, no dissemination of propaganda material for unconstitutional organisations, respect for and care of human dignity, no ethnic or religious discrimination, or discrimination on the basis of handicap or of expressed ideas (this is the wording of the German and Italian Codes, but it is also used in two other ones in a shorter formulation).
- Fair trading, acting decently with the customers, giving them clear information, including about pricing, etc. is explicitly mentioned in three codes, one of them adding that they commit themselves not to promote illegal commerce!

- Honesty, legality (no material in breach of the law), responsibility of the ISPs for their own content, are topics covered by two codes.
- Finally, a range of topics is mentioned only once: reasonable endeavour to respect other codes (TV, radio authorities, sales,...), domain name use and ownership, users' responsibilities for their own data, best practices, netiquette, freedom of expression and of information, journalistic style reporting, identification and right to anonymity, intellectual property rights. An original idea embodied in the Canadian code is that its members are committed to public education in matters such as how to assign liability for content and network abuse, and to public help for understanding the options available to all stakeholders.

Some of the service providers, mainly those who are not associated with others, include clauses about chain letters, unsolicited email, vulgarity, obscenity, etc. There are also rules for chat rooms, BBS and other group activities and clubs

In the domain which most often, with a curious sense of modesty or decency, is officially called 'Internet content', it is worth mentioning the recommendations of the Bertelsmann Foundation and having a look at the codes of the Australian Internet Industry Association ('Australia's national industry body for Internet commerce, content and connectivity').

- The recommendations of the Bertelsmann Foundation are not self-regulation documents, but an incitement to develop content self-regulation for the world of business, and mainly for the Internet industry, to create private control agencies to be favoured by public authorities, etc.
- The Australian codes are specific for content regarding persons under the age of 18 years, and include
 - 'ISP Obligations in Relation to Internet Access Generally' (Code 1),
 - 'ISP Obligations in Relation to Access to Content Hosted Outside Australia' (Code 2),
 - 'Internet Content Host Obligations in Relation to Hosting of Content Within Australia' (Code 3), and finally a list of 'Approved Filters'.

It should be stressed that these codes remain reserved about enforcement. The term 'reasonable' is mentioned 22 times in 3 pages, in expressions such as 'take reasonable steps' (13 times), 'reasonably effective means' (twice), 'reasonably ascertained' (twice), 'reasonably practicable', 'within a reasonable time'... The same texts propose also measures 'to the extent applicable' (7 times), showing again that the enforcement is regarded with certain caution and circumspection!

When looking at the sectoral codes, one could expect more specific clauses, since the domain is better defined. What clearly emerges is the more contractual character of these documents and the insistence on practice in accordance with the standards of the profession. The typical case of this shift

towards more contractual clauses is the Code of Ethics of the Internet Health Care coalition: this code requires candour and trustworthiness, quality of information, products, services, the best *commercial* practices (our emphasis), the highest standards by Health Care Professionals.^{xxvi}

In the world of the online publishing, the French 'Charte de l'édition électronique' signed by 7 publishers (among which *Le Monde* and *Libération*) reaffirm the usual rules of the profession; but they also go into details such as the number of paragraphs that can be quoted under fair dealing provisions, and without being accused of plagiarism, specification of the rules related to links that may be created to online content (for example, links are authorised without condition provided the link opens a new window of the browser), the interdiction without consent of reproduction by means such as scanning, digital copying, ...

In electronic commerce, the 'Model Code of Conduct for Electronic Commerce' proposed by the 'Electronic Commerce Platform Nederland' (ECP-NL) seems to us to offer typical clauses that can be found in good commercial practice: reliability of the information which is provided, reliability of systems and organisations, reliability of types of electronic signatures, transparency in the communication, confidentiality, respect for the intellectual property,...

Much more impressive and influential is an international group mentioned earlier, the Global Business Dialogue on eCommerce (GBDe), which seeks to define a world-wide model for the regulation of electronic commerce. The archives of the GBDe site refer to the wish expressed by former European Commissioner Martin Bangemann for a strengthened international coordination.^{xxvii} GBDe includes the Chief Executive Officers of around 60 private companies from all over the world: AOL Time Warner, Fujitsu, Vivendi Universal, Accenture, Toshiba, Telekom Malaysia, Korea Telecom Freetel, Cisneros Group of Companies, Seagram, Eastman Kodak, Walt Disney, Hewlett Packard, IBM, MCI Worldcom, Alcatel, ABN AMRO Bank, DaimlerChrysler, etc. Recommendations were defined at the Paris Summit (13 September 1999), Miami (26 September 2000) and Tokyo (14 September 2001). These CEOs divided the work among themselves in 1999 and established nine working groups, each under the responsibility of one of the CEOs for defining self-regulation proposals in the following specific domains: authentication and security (led by NEC), consumer confidence (DaimlerChrysler), content/commercial communications (Walt Disney Company), information infrastructure/market access (Nortel Networks), intellectual property rights (Fujitsu), jurisdiction (EDS), liability (Telefónica), protection of personal data (Toshiba), and tax/tariffs (Deutsche Bank). Those domains have subsequently been slightly redefined, and now comprise: consumer confidence, convergence, cyber security, digital bridges,

eGovernment, intellectual property rights, Internet payment, taxation, and trade/WTO.

This list shows that we are not far from the main preoccupations of the European Commission Legal Advisory Board.^{xxviii} The recommendations of the GBDe conferences are available on their site, and are presented theme by theme.

But let us give a broader picture: on December 13, 2000, the GBDe, the International Chamber of Commerce and the Business and Industry Advisory Committee (BIAC) at the OECD signed an agreement on electronic commerce which declared: "The GBDe, the ICC and BIAC are all committed to foster international co-operation on the full range of *public policy issues* arising from the Internet, including issues such as IPR, consumer confidence, cyber security, and the digital divide, and will work together to identify best practices for such initiatives." (stress added)^{xxix} Do they intend to overcome the European Legal Advisory Board's work and lobby against any European Directive in the domains mentioned? History will provide the answer!

Recently GBDe issued a document called *Cyber Ethics*, which was the result of a Task Force created in 2001, chaired by Thomas Middelhoff, Chairman and CEO of Bertelsmann AG. The status of the document is not quite clear, as it is called a 'Statement of Principles on Cyber Ethics', but it seems that there is only one 'core principle': "A core principle that guides the GBDe is the belief that business plays a leadership role in helping to shape the development and the growth of the Internet to be a positive influence on the lives of people everywhere,..." Perhaps another one could be added: there is a need to increase consumer trust. What is curious and worth noting is what is considered as unethical and what is suggested for the future: "The GBDe believes, therefore, that market-oriented transnational solutions should be developed and promoted to protect against the spread of unethical material such as child pornography, anti-Semitic, racist or xenophobic content, while fully protecting rights to free speech and expression as well as artistic and journalistic freedom."^{xxx} Evidently the solution which is proposed to remedy the dissemination of unethical material is self-regulation. This looks very similar to the recommendations of the Bertelsmann Foundation Memorandum!^{xxxi} But what is still more curious is that *Cyber Ethics* seems to be confined to the domains mentioned, and that e-commerce as such does not appear to bring in any new ethical dimensions. It looks as though ethics was considered as instrumental for the development of e-commerce, and that its role is to clean up from the Cyberspace what could slow down his development!

Still in the domain of e-commerce, we should mention the codes of labelling organisations such as the Better Business Bureau (BBBOnline), WebTrust, and TRUSTe, which try to comfort customers, raise their

confidence and assure them of the reliability of the firm with which they are in contact: security (e.g., of credit card numbers), viability (of website), protection (of consumers' private life), labels available, reliability, privacy, kids' protection,... But signatories of the clauses commit themselves only to satisfy the labelling firm's principles. The label does not give any guarantee of the quality of the products or of the services of the labelled firm.

To conclude our analysis of different sectors, we should examine the codes of telemarketing and teleservices firms. In fact, there are no really new themes: proper identification, calling-hour restrictions, due information to consumers, authorisation for payment, prohibitions under the rule, 'Do not call policies', etc. Sometimes there are details, which are only understandable by trained people (such as the use of auto dialer and ADRMP/Automatic Dialing Recorded Message Players on emergency lines).

We cannot resist quoting an abstract from one of the American associations of software publishers, because it has been also included nearly *verbatim* in the Guidelines for GeoCities members before its merger with Yahoo: "Use reasonable efforts to ensure that the unauthorised reproduction and/or distribution of copyrighted computer programs does not occur on or through its servers; that cracker utilities and serial numbers used to circumvent manufacturer-installed copy-protect devices in computer programs, will not be posted on its server(s); and that links that promote sites that contain pirated computer programs and/or cracker utilities and serial numbers will not be posted on its server(s). (...) Remove pirated computer software and cracker materials or otherwise block access to it as soon as practicable after it is discovered." It is quite understandable that software publishers impose such conditions, but when they are included in a service provider's code, it looks more like a self-protection condition designed to avoid the service provider being taken to court by the software publisher. Such details may also be a sign of an obsessive fear of hackers, crackers and other pirates. And yet, can a code of ethics or practice prevent them from pursuing such practices?

3.3.2 Enforcement, Sanctions and Procedures

Faithful to our grid analysis we should enquire about the effectiveness and the constraining enforcement of such documents, whether they are generic, specific, or sectoral. Half of them say something about enforcement. Typically, the service will be removed if the client contravenes the rules of the code (Janet, Excite, Yahoo); membership may be suspended (ISPA); a legal suit can be brought in particular if illegal or illicit material has been found (ISPA-Italy).

But some codes also proposed to treat cases according to amicable agreement or to deal directly with the service provider without going through its association, which could lead to the erasing of all traces in case of criminal suit.

The most typical cases are those of the Bertelsmann Foundation, of the GBDe, and of the ECP-NL or also of the Italian service providers association. *Mutatis mutandis*, those four groups share the same point of view: the procedures must be created by the private partners of the business world. It is also up to them to create self-regulation agencies, to set up dispute resolution mechanisms. The Italian association speak of a 'Giurì di Autotutela' (Self-Regulation Jury) which is enforced by a 'Comitato Attuativo' (Enforcement Committee) which can also act as an 'appeal court'.

4. ORIENTATIONS FOR A PRELIMINARY CONCLUSION

Throughout our analysis, some documents appeared to us as noteworthy, for one reason or another, positively or negatively. Let us again follow the features of our grid of analysis.

- *Ratione personae*, we would mention the Australian Internet Industry codes, which well distinguish the different actors, authors and people concerned (including society as a whole); they make explicit the necessary consultation and who is approving what. The Memorandum of the Bertelsmann Foundation and the ECP-NL Model Code also mention the necessary participation (although we fear that most of the time it will remain confined to the institutional partners, if happens at all).^{xxxii}
- *Ratione loci*: the texts we have seen are far from overcoming national borders, although this is often advocated as one of the advantages of self-regulation.
- *Ratione materiae*, our attention was caught by the IFIP codes, the French Charta for the Internet (although it has not been finally adopted), the 1999 code of ISPA-UK, the French Charta for electronic publishing, and some clauses of the documents of Excite, Yahoo and GlobalOne, even if too often the clauses are purely contractual (Terms of services).
- On the other hand, the weaknesses relate to the constraining rules, or of their enforcement: too much is left to the discretion of the authors who enact the rules without offering any transparency, or even clarity, particularly to the people concerned and the general public. GeoCities used to have a specific reporting form, allowing any surfer to inform the service provider about anything that appeared to be in contradiction with

the members' Guidelines. It was at the same time a document summarising what could be supposed as litigious.

Our survey reveals that we are still at the beginning of a process. We cannot avoid the impression of superficiality, heterogeneity, incoherence and even irrelevance to compensate for the absence of other regulating instruments. We fear we may just have some words that are meaningless or even empty. At least we have to raise the question: Whom are these codes protecting? We fear – and indeed believe – that the current codes we have analysed are not really protecting those who have difficulties in defending themselves, whatever they may be: users, customers, clients. In the words of Prof. Michel Vivant, concluding the 1999 Paris Summit of the Regulators (quoting Lacordaire): “Between the strong and the weak, it is the law that makes you free and it is liberty that oppresses.” Our reading of the documents leads us to conclude that presently they are more self-protecting than self-regulating documents, and that market freedom tries to impose itself as the law of cyberspace.

But let us not speak only as a Cassandra *a priori*. There are authors who stress that self-regulation must be considered among the regulating and control systems: beyond the legal systems and the state authority, they may have their place and a sense.^{xxxiii} Pierre Trudel, from the University of Montreal, considers that the regulating techniques include today “the application of the common law, the ruling of the States, the contractual techniques, the self-regulation, the soft law, the standardisation, and the technical normalisation.”^{xxxiv}

In order to make some progress, again following the features of our grid, we would suggest questioning the legitimacy of the actors, and examining the principle of subsidiarity, the relevance of the contents, and the efficiency of the systems of sanctions and of control in a space which is global, and thus seems to overcome national territoriality.

Self-regulation, says Pierre Trudel, may be defined as “the recourse to voluntary norms which are developed and accepted by those who participate in a determined (specific) activity.”^{xxxv} But, what does ‘voluntary’, or ‘determined’ mean? Who are those who participate in the activity? What kind of participation? In our view, the legitimacy of the actors will be recognised only if all people concerned participate in the process of elaborating the texts, maybe as active or passive subjects.

Regarding subsidiarity, we are convinced that there is content which must escape self-regulation for reasons of ethics and democracy: the interpretation of some values cannot be appropriated or usurped by particular interests. We have made explicit elsewhere the criteria which could serve to direct our work: as soon as the interests of the majority are at stake or when individual citizens risk becoming more fragile and vulnerable, we must

retain the capacity of the public authority to keep open the 'horizon of universality' which characterises the ethics of democracy.^{xxxvi} Furthermore, the legitimacy of the contents will be assessed in different ways according to the cultures and their systems of values. It has often been said that deontology could anticipate the law, for instance because of the rhythm of technological development. We have not found evidence of such an anticipation in the texts we have examined. On a humorous note, we have stressed several times that among the more explicit codes of service providers in terms of privacy protection, the Dutch ISPA code covered the matter in 10 lines, whereas the European Directive of 1995 needed 34 articles and some 20 pages.^{xxxvii}

What can really be enforced? The case of the Safe Harbour Principles in the discussion between the European Union and the USA will have to be cautiously assessed in some time. Most often in the documents we have analysed, the efficiency of the procedures which are foreseen has yet to be proven. The procedures are ill-defined and the complaints are at risk of not really being considered or at least of remaining without any follow up.

What then has to be the role of the law and of the State? There is no need to adopt a dogmatic position, but we think that there are ambiguities to be solved. After the time of the Welfare State, the time has come of 'the least State possible'. The trends relating to the discrediting of big institutions are well known. Very often, faced with the question of globalisation, the State has no other means than 'to defend its champions'. It 'gives a framework for self-regulation'. As with the clients, customers and users we were mentioning earlier, is not the State in the situation where it is in search of its place and of its own legitimacy? In the meantime, it is considered as an actor among the others, at least in the mind of certain big 'global' businesses. Some of those champions of the new conquest of e-commerce do not hesitate to say explicitly that its role must be minimised, that we have to curb its intervention.^{xxxviii} Would it not be wiser to ask that all the actors may find their place and their role, and that they bring respect for each other? The controversies must be spelled out publicly, the interests of each of the parties clarified, the issues at stake clearly weighed. The decision must be that of the people responsible in front of all. It is a primary ethical principle termed the 'golden rule'.^{xxxix} Will it be the rule of what is called sometimes the 'coregulation' or even the 'multi-regulation'? We know all too well that the deep changes towards an information society are turning previous marks and references upside down and that slogans such as 'everything in network' have created new exclusion. Efficiency, productivity,... are concepts which have lost their ancient meaning, which is why we must cling to reason, and provide it with some ethical foundations.

"The structural imbalances of the world-wide Internet infrastructure, the deep inequalities in the access to information, the transnational oligopolies

controlling the world-wide infostructure are major preoccupations for the regulator. A new form of regulation or of governance at the world level must be conceived in an ethical world-wide perspective, at the service of equity and of the human development.”^{xl}

* * *

There are a number of questions raised by this analysis, which we have asked throughout this paper, and which we consider important to any discussion concerning self-regulation. We repeat them in conclusion and offer them for consideration:

- “Are these [self-regulation] documents still deontology instruments or only texts created for the self-defence and protection of those who are writing and enacting them?”
- “*Ratione loci*: ... does self-regulation allow us to solve the difficulty, as it is usually termed, of the territoriality of the legal systems?”
- “Do they [GBDe, ICC, BIAC] intend to overcome the European Legal Advisory Board’s work and lobby against any European Directive in the mentioned domains?” (re: agreement signed on December 13th 2000)
- “Can a code of ethics or practice prevent them [hackers, crackers and other pirates] from pursuing such practices?” (re: software publishers)
- “Whom are they [self-regulation documents] protecting?” (re: protection in absence of regulating instruments)
- “... what does ‘voluntary’, or ‘determined’ mean? Who are those who participate in the activity? What kind of participation?” (re: Pierre Trudel’s definition of self-regulation)
- “What can really be enforced?” “Is a code of ethics etc. useful unless there is a notion of ‘sanction’ associated to it?”
- “What then is the role of the law and of the State?”

References:

- i. Herbert Maisl, Legal Problems Connected with the Ethics of Data Processing, Study for the Council of Europe (CJ-PD[79]8), Strasbourg, August 29, 1979. Same author, Drawing up of an Analysis Framework for Rules of Various Kinds in the Field of Data Processing Management, Council of Europe (CJ-PD[82]19), Strasbourg, September 17, 1982. The meeting of 27-30 September 1982 concluded not to deepen the subject further: see Secretariat Memorandum (CJ-PD[81]8), and the last report of Herbert Maisl, ‘Drawing up an analysis framework for rules of various kinds in the field of data processing management’ (CJ-PD[82]19), as well as the Minutes of the meeting (CJ-PD[82]31). In the meeting of 4-7 October 1983, the subject ‘deontology of informatics’ was not anymore on the agenda (CJ-PD[83]25).
- ii. *Ethics of Computing: Codes, Spaces for Discussion and Law*, Jacques Berleur & Klaus Brunnstein, Eds., A Handbook prepared by the IFIP Ethics Task Group, London:

- Chapman & Hall, 1996, 336 p., ISBN 0-412-72620-3 (now available at Kluwer Academic Publishers).
- iii. See for instance: The Center for Ethics and the Professions, Harvard University : <http://www.ethics.harvard.edu/>, The Markkula Center for Applied Ethics, Santa Clara University, CA, <http://www.scu.edu/SCU/Centers/Ethics/>, DePaul University Institute for Business & Professional Ethics, <http://www.depaul.edu/ethics/>, the Centre for Business and Professional Ethics in the University of Leeds, http://www.philosophy.leeds.ac.uk/Links/body_cbpe.htm,...
 - iv. See for instance: Online Ethics Center for Engineering and Science, <http://www.onlineethics.org>
 - v. See for instance: the Centre for Computing and Social Responsibility of the De Montfort University in Leicester (UK) (<http://www.ccsr.cse.dmu.ac.uk/index.html>), the site InfoEthics of UNESCO (<http://www.unesco.org/webworld/infoethics/infoethics.htm>), the Australian Institute of Computer Ethics (<http://www.aice.net>), the International Center For Information Ethics du Prof. Rafael Capurro (<http://icie.zkm.de/>),...
 - vi. Global Business Dialogue, <http://www.gbde.org>
 - vii. World summit of regulators, Paris 1999, http://www.unesco.org/webworld/news/csa_summit.shtml
 - viii. Paper presented at the New York New Media Association, 10 June 1998. See also the important book of Lawrence Lessig, *Code and other Laws of Cyberspace*, Basic Books, New York 1999
 - ix. Jacques Berleur, Penny Duquenoy & Diane Whitehouse, Eds., *Ethics and the Governance of the Internet*, IFIP-SIG9.2.2, September 1999, IFIP Press, Laxenburg - Austria, ISBN 3-901882-03-0, 56 p. This monograph may be downloaded from the SIG9.2.2 website, by clicking on 'Ethics and Internet Governance' : <http://www.info.fundp.ac.be/~jbl/IFIP/cadresIFIP.html>
 - x. The Net: User Guidelines and Netiquette, by Arlene H. Rinaldi <http://www.fau.edu/netiquette/net/>
 - xi. EuroISPA Codes of Conduct http://www.euroispa.org/25.asp?page_id=25
 - xii. La Charte de l'Internet, <http://www.planete.net/code-internet/> (Today available through <http://www.archive.org>) An English translation of this Charter has been prepared by Dr. Victoria Steinberg, Foreign Languages Department, University of Tennessee, Chattanooga. Email: Victoria-Steinberg@utc.edu
 - xiii. QuickLinks - Self-regulation/codes of conduct, <http://www.qlinks.net/quicklinks/selfreg.htm>
 - xiv. Proceedings of the OECD/BIAC Forum on Internet Content Self-Regulation, Paris, March 1998, DSTI/ICCP (98)18 Final, pp.21-31. Downloadable from <http://www.oecd.org/dsti/sti/it/secur/act/self-reg.htm>
 - xv. Jacques Berleur, Penny Duquenoy & Diane Whitehouse, Eds., *Ethics and the Governance of the Internet*, doc. cit.
 - xvi. The full analysis is given in: Jacques Berleur & Marie d'Udekem-Gevers, Codes of Ethics within IFIP and Other Computer Societies, in: *Ethics of Computing: Codes, Spaces for Discussion and Law*, Jacques Berleur & Klaus Brunnstein, Eds., op. cit. A summary may be found in: Jacques Berleur, IFIP Framework for Ethics, in: *Science and Engineering Ethics*, A Special Issue on "Global Information Ethics", Opragen Publications, Guildford, Surrey, UK, Volume 2, Issue 2, 1996, pp. 155-165.
 - xvii. <http://www.info.fundp.ac.be/~jbl/IFIP/sig922/selfreg.html>

- xviii. Jacques Berleur & Marie d'Udekem-Gevers, Codes of Ethics within IFIP and Other Computer Societies, art. cit.
- xix. 'Memorandum on Self-regulation of Internet Content' – 'Self-regulation as a Foundation', in : Jens Waltermann and Marcel Machill, Eds., *Protecting our Children on the Internet, Towards a New Culture of Responsibility*, Bertelsmann Foundation Publishers, Gütersloh, 2000, pp. 35-36.
- xx. Excite specifies that what is applicable is the law of the State of California, Yahoo, the law of the County of Santa Clara, for example!
- xxi. Our first analysis has been presented in: Jacques Berleur and Jean-Marc Dinant, 'Will Self-Regulation Improve the Internet Security?', in: *IFIP/SEC2000: Information Security. Information Security for Global Information Infrastructures*, Sihon Qing & Jan H.P. Eloff, Eds., Proceedings of the IFIP-16th World Computer Congress, SEC2000, International Academic Publishers, Beijing 2000, pp. 306-309.
- xxii. It seems that 52 millions of American adults take medical consultation on-line. See: The US Government Electronic Commerce Working Group, *Leadership for the New Millennium, Delivering on Digital Progress and Prosperity*, Third annual report, 16 January 2001, p. 20, <http://www.ecommerce.gov/> or <http://www.ita.doc.gov/td/industry/otea/ecommerce/>
- xxiii. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Globalisation and the Information Society - The Need for Strengthened International Coordination, (this page seems not to be anymore available on the European site <http://europa.eu.int/ISPO/cif/policy/com9850en.pdf>; but see the GBDe site at <http://www.gbde.org/origins.html>)
- xxiv. Legal Advisory Board, Legal Issues of the Information Society, <http://europa.eu.int/ISPO/legal/en/lab/labdef.html>
- xxv. The GBDe, the ICC and the BIAC to the OECD sign agreements on eCommerce issues, <http://www.gbde.org/releases/121300a.html>
- xxvi. Statement of Principles on Cyber Ethics, <http://www.gbde.org/ethics/>
- xxvii. 'Memorandum on Self-regulation of Internet Content', doc. cit.
- xxviii. We have made explicit elsewhere this crucial question of the relationship between democracy and self-regulation: Jacques Berleur, *Self-Regulation and Democracy: Choice and Limits?*, in: *User Identification & Privacy Protection, Applications in Public Administration & Electronic Commerce*, Simone Fischer-Hübner, Gerald Quirchmayr, and Louise Yngström, Eds., Stockholm 1999, DSV - Stockholm University/Royal Institute of Technology, Report Series 99-007, ISBN 91-7153-909-3, pp. 1-19.
- xxix. See for instance, Yves Poulet, *Quelques considérations sur le droit du cyberspace*, (Octobre 2000) http://www.kvab.be/werking/cawet/cawet_inf/fibt.htm or <http://www.droit.fundp.ac.be/textes/droit-du-cyberspace.PDF>
- xxx. Pierre Trudel, France Abran, Karim Benyekhlef et Hein Sophie, *Droit du Cyberspace*, Thémis 1997.
- xxxi. Pierre Trudel, 'Les effets juridiques de l'autoréglementation', *Revue de droit de l'université de Sherbrooke*, 1989, vol. 19, n° 2, p. 251
- xxxii. Jacques Berleur, *Self-Regulation and Democracy: Choice and Limits?*, art. cit.
- xxxiii. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Brussels, *Official Journal of the European Communities*, 23.11.95, No L281/31-50.

- xxxiv. Associated Press Release presented the creation of GBDe under the title 'Global companies form group to curb government regulation of Internet' (January 14, 1999) <http://www.gbde.org/releases2.html>
- xxxv. The statement is known most of the time in its negative form: 'Do not do to the other what you would not like to be done to yourself.' But there are variants: 'Treat the others as you want to be treated,' 'Treat others only in ways you are willing to be treated in the same situation.' (Harry J. Gensler, *Formal Ethics and the Golden Rule*, Loyola University Chicago, Fall 1994, *ad instar manuscr.*, pp. 101-125.)
- xxxvi. Philippe Quéau, UNESCO, World Summit of regulators, "Internet and the New Services", Paris, 30 November – 1st December, 1999, http://www.unesco.org/webworld/news/991201_queau_csa.shtml
- xxxvii. See, Banks parade new products and strategies to keep afloat" (The Guardian July 5, 1998)
- xxxviii. On a normal day, it is not uncommon for bank branches to handle and process cash of up to 40 million Naira.
- xxxix. See "Technology comes into banking hall" (The Guardian, March 5, 1997)
- xl. Government recently introduced higher denominations of 100, 200 and 500 Naira, which banks hope would ease some of the problems associated with the use of ATMs.
- xli. The Rural Banking Scheme (RBS), introduced by government in 1977, compelled all banks to increase their presence in rural areas by allocating to each of them a minimum number of branches they must establish, within a specified length of time, in rural areas.

6. Annex

As indicated, the URLs of the following texts as well as their analysis, document by document, and according to our grid of analysis (figure 1) are available at:

<http://www.info.fundp.ac.be/~jbl/IFIP/sig922/selfreg.html>

Let us point out that, though the analysis was based on documents collected between 1998 and 2001, there has been no direct systematic communication with their authors. Specifically we do not know how they operate organisationally, the number, location of the staff involved, their modus operandi, whether some are purely virtual,... We are shortly to distribute a questionnaire to elucidate some of the above, as part of the SIG9.2.2' on-going work.

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Self-Regulation Instruments – Classification – A Preliminary Inventory

(HCC-5, Geneva 1998; SIG9.2.2 January 2000; SIG9.2.2 June 2000; IFIP-WCC-SEC2000; SIG9.2.2 July 2001)

Jacques Berleur, Penny Duquenoy, Marie d'Udekem-Gevers,
Tanguy Ewbank de Wespín, Matt Jones and Diane Whitehouse

1. Informatics – Computing in General

1.1. General Principles

The Ten Commandments of Computer Ethics, by the Computer Ethics Institute (CEI), Washington, D.C., 1992

1.2. Specific Principles

1.2.1. For Professional Societies

Codes (Standards/Guidelines) of Ethics (Practice/Conduct) of IFIP Computer Societies

2. The Internet

2.1. General Principles

One planet, One Net: Principles for the Internet Era, CPSR (Computer Professionals for Social Responsibility), 1997

Suggestion of Netiquette - Core Rules of Netiquette, 1994

The Net: User Guidelines and Netiquette, 1998

Online Magna Charta, Charta of Freedom for Information and Communication, 'The Wartburg Charta', 1997

The Internet Society of New Zealand, The Internet 'Twelve Commandments', 1997

Confederation of European Computer User Associations (CECUA), Bill of Rights for the Citizen in the Global Information Society, 1998

CEPIS' Mission Statements, Contribution to a Citizen's Charter in the Information Society, 1999

2.2 Specific Principles

2.2.1 For 'Virtual Communities'

JANET Acceptable Use Policy, 1995

2.2.2 For Different Actors

La Charte française de l'Internet, Proposition de Charte de l'Internet, Règles et usages des acteurs de l'Internet en France, 1997

2.2.3. For (Associations of) Internet Service Providers (ISPs)

Austria, ISPA-Austria, ISPA-Verhaltenrichtlinien (ISPA Guidelines of Conduct)

Belgium, ISPA-Be, Code de Conduite, Version 1.0 (April 30, 1998)

France, AFA - Association des Fournisseurs d'Accès et de Services Internet (France):

Pratiques et Usages, janvier 1998 - Les pratiques des membres de l'AFA en matière de données personnelles et droit d'auteur, octobre 1998

Germany, Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V. (Voluntary Self-Control for Multimedia Service Providers): Statutes - Code of Conduct of the Association - Complaint Rules for the Association, 1997

Italy, Associazione Italiana Internet Providers, Codice di Autoregolamentazione per i servizi Internet, 1997

The Netherlands, Vereniging van Nederlandse Internet Providers, NLIP-Gedragscode, 1999

UK, ISPA-UK, Code of Practice (1st version, 1996; new one 25 January 1999)

Canadian Association of Internet Providers (CAIP), Code of Conduct, 1997

Western Australian Internet Association, Code of conduct, 1997

The Internet Society of New Zealand, Internet Code of Practice, 1999

2.2.4 For other Internet Service Providers

Excite, Terms of Service, Community Standards (Chat, Excite Clubs, Message Boards), Privacy Policy, 1995

GeoCities Members Guidelines, and particularly GeoCities Page Content Guidelines and Member Terms of Service, 1998

Yahoo, Terms of Service, 1994

Global One (owned by France Telecom), Code of Conduct Policy for Global One IP Products and Services, 1998

2.2.5. For Governmental Services and Actors

The Intergovernmental Information Technology Leadership Consortium (Council for Excellence in Government) - Draft - Consortium Charter, 1997

2.2.6 For the Industry in General

Bertelsmann Foundation, Memorandum on Self-regulation of Internet Content, Gütersloh, 1999

Australia, Internet Industry Codes of Practice, Codes for Industry Self-Regulation in Areas of Internet Content Pursuant to the Requirements of the Broadcasting Services Act 1992 as Amended December 1999

2.2.7. For Specific Sectors and Services

2.2.7.1. Health Sector

Health Internet Ethics: Ethical Principles For Offering Internet Health Services to Consumers, 2000

Internet Healthcare Coalition, eHealth Code of Ethics, 2000

2.2.7.2. Publishing Sector

Charte de l'édition électronique (Le Monde, Libération, ZDNet, La Tribune, Investir, Les Echos, L'Agefi, France): rights and duties of the consumers, editorial content, copyright and intellectual property rights, 2000

2.2.7.3. eCommerce Sector

Electronic Commerce Platform Nederland, Code of Conduct for electronic commerce, Draft version 3.0, November 1999

Global Business Dialogue on Electronic Commerce, The Paris Recommendations, 1999

Global Business Dialogue on Electronic Commerce, Cyber Ethics, 2001

International Chamber of Commerce, ICC Guidelines on Advertising and Marketing on the Internet, 2 April 1998

Better Business Bureau Inc., BBBOnline, Code of Online Business Practices, Draft 1999

WebTrust Certification Services for eCommerce Web Sites, 1997

2.2.7.4. "Software publishers" Sector

US SPA's (Software Publishers Association) Guidelines for Copyright Protection (previously called 'ISP Code of Conduct'), 1997

2.2.7.5. Telemarketing Sector

USA, American Teleservices Association, ATA Code of Ethics, Recommended standards for professional and ethical telemarketing conducted by members of the American Teleservices Association- "Telemarketing Sales Rule Compliance Guidelines", and "TCPA (Telephone Consumer Protection Act) Compliance Guidelines", 1999