



In Response

A DISCUSSION NOTE ON THE ROLE AND SPECIFIC PROVISIONS OF THE OECD CONSUMER PROTECTION GUIDELINES

September 1999

INTERNATIONAL FRAMEWORK

BIAC has consistently supported the development of a set of high level international guidelines. International consumer protection guidelines should be broad and flexible to allow for different effective approaches to implementation. Such an approach will allow the guidelines to stand the test of time. Moreover, high level guidelines will ensure the universal applicability of the principles contained therein and will very likely become the benchmark for effective consumer protection on global networks. Guidelines that are not high level and universally applicable to all organisations and new and evolving business models will create uncertainty within the international community as to whether a specific business model should comply with detailed provisions. Finally, it is very likely that more detailed guidelines would need to be frequently redrafted in order to accommodate new business models that may evolve and that are not even contemplated today. Guidelines with a prescriptive level of detail risk interfering with the market-driven experimentation and refinement of empowering technologies and new business models, which could ultimately deprive consumers of the benefits of future progress. The 1980 OECD Privacy Guidelines are an example of the success of this approach, namely a set of policy level guidelines that are universally applicable, which have stood the test of time.

I. LEVEL OF PROTECTION: THE TRANSPARENT AND EFFECTIVE PROTECTION FOR ELECTRONIC COMMERCE

The OECD Ministerial Declaration on Consumer Protection is the only international consensus document on this issue. The Declaration calls for consumers who participate in electronic commerce to be afforded a «transparent and effective level of protection for electronic transactions.» This highly negotiated language recognises the unique circumstances of electronic commerce. In certain cases mechanisms unique to the online medium offer consumers greater protections through empowering technologies that provide consumers enhanced control over their commercial interactions and easy access to comparative information and/or shopping including price, product offerings, and quality. However, there are certain traditional protections that are not transferable from the offline world to the online world and may require adaptations that respond to the technological and market realities of electronic commerce. Cooling-off requirements are an example of the latter situation. For example a consumer receives immediate non-returnable benefits from downloadable products. Under traditional cooling-off requirements a consumer would have the ability to rescind the transaction and at the same time continue to receive the benefit of the non-returnable product.

Mouvement des Entreprises de France (MEDEF) does not agree with this Discussion Note. A full list of BIAC Member Organisations is provided at the end of this paper.

Therefore, a call for equivalency or a level of protection that is not less than the level of protection afforded in other forms of commerce is clearly inconsistent with the recognition that policies should take into consideration the unique circumstances of electronic commerce. As stated in the introduction, business and industry is committed to offering effective consumer protection online both because the market is calling for it and because it will work to ensure the continued growth of electronic commerce. Therefore, business and industry have developed and will continue to develop and implement online consumer protection mechanisms that offer a level of protection that is as transparent and effective as that afforded through other forms of commerce.

II. FAIR ADVERTISING AND MARKETING PRACTICES IN ELECTRONIC COMMERCE

In the offline world advertising and marketing is much more clearly distinguishable. In the online world the distinction between commercial communications and informational content is blurred. The concepts of marketing and advertising in the electronic medium are not yet clearly defined and would be premature, given that the interactive nature of the medium creates new challenges for the differentiation between commercial communications and informational content, which are not yet resolved. International business in numerous fora is addressing issues related to advertising on the Internet working to adapt existing self-regulatory codes to the online environment. In fact, the International Chamber of Commerce has recently issued its Revised Guidelines on Advertising and Marketing on the Internet. Therefore, merely transferring offline policies and/or protections to the online world would be inappropriate.

III. INFORMATION DISCLOSURE REQUIREMENTS

The goal of disclosing information regarding an online transaction should be to empower a consumer by providing information that is useful in helping him or her make a decision as to whether he or she would like to interact or engage in a transaction with an online business. In most circumstances, the market will determine the information that consumers need/want/desire to make an informed decision. If after the market develops, a clearly identifiable market failure exists, governments will and should address this market failure according to their specific and unique consumer protection regimes and should do so in consultation with the private sector.

A detailed list of information that online business should disclose in many cases would be overwhelming and confusing to consumers, could undermine current and evolving online business models, may prove irrelevant to consumers, or may already be controlled by applicable contract law. Below are some examples.

Online Identification of the Business

Disclosure of registration or license numbers may be practically limitless – for example companies may be registered in almost all countries. They may also be registered in states, provinces, etc of different countries. Moreover, such information may be of little value to consumers from distant locations; and Disclosure of relevant codes of conduct and self-regulatory schemes may also be very numerous and the relevant code of conduct or self-regulatory scheme may be applicable to only a specific line of business and or transaction which may confuse consumers as to the actual application of any given code or scheme.

Disclosure of information relating to the transaction

Disclosure of information relating to the transaction will be controlled by the applicable contract law. A list of required disclosures may not address all of the legal requirements or may go beyond legal requirements applicable by law. Conflicting requirements will be confusing for both businesses and consumers. In addition, there are some disclosures that are not feasible. For example, a vendor may not know all of the taxes that may be assessed, especially in the area of financial services where taxes often depend upon the income or wealth of the consumer – information that the vendor is not likely to know. Such sectoral and/or issues make detailed lists very difficult to agree upon. Moreover, new online business models such as priceline.com and eBay may not be able to comply with detailed information disclosures given that these

companies simply serve as intermediaries between a buyer and seller. The fact that these companies cannot disclose all of the itemisation of total costs, terms of delivery, period for which the offer is valid, applicable warranties, etc. may ultimately prejudice such business models despite the fact that they offer consumers significant cost benefits and greater choice.

IV. APPLICABLE LAW AND COMPETENT FORUM

A primary goal of commercial law is to develop legal certainty for transacting parties. The issue of choice of law and choice of forum in the context of electronic commerce is a very complex issue.

The Internet offers small and medium enterprises a global marketplace for their goods or services offering consumers greater choice. Such choice could be greatly restricted if businesses are required to comply with a country of destination principle. Compliance with the laws of many different countries would impose tremendous costs on business and would be prohibitively expensive for small and medium-sized enterprises. It would also not offer businesses the certainty they need to offer their goods and services globally via the Internet and may lead them to voluntarily restrict transactions to limited jurisdictions thereby reducing consumer choice. Electronic commerce will not be viable if every online transaction were subject to each set of laws in the jurisdiction of every potential consumer, laws which may subject the transaction to inconsistent regulations.

On the other hand, it is understandable that consumers cannot be expected to understand all of the consumer protection policies and laws where online businesses are located.

Enforcement of foreign judgements is another complexity. Is a consumer offered transparent and effective protection if they have the benefit of their laws and courts but cannot enforce a judgement against a business located in a foreign jurisdiction? It is arguable that this offers less protection because the consumer may incur significant additional costs to bring an action, the potential judgement of which cannot be enforced.

Given these and other complexities, a thorough and exhaustive review of this issue is essential before governments make definitive pronouncements. Premature conclusions that do not address practical realities and the unique circumstances of electronic commerce could create significant obstacles to the continued growth of electronic commerce. The private sector should be given adequate time to review the market and to develop initiatives to address this issue. Such initiatives will take into consideration the demands of the market and the unique circumstances of electronic commerce.

CONCLUSION

Consumer policies for the online medium have been and continue to be developed and implemented by both business and governments. Self-regulatory solutions provide the flexibility to respond to the dynamic nature of the online environment, including new and evolving online business models. AOL and eBay are very visible examples of how this flexibility offers effective consumer protections that are responsive to market forces. Any policies must accommodate and promote this highly dynamic environment which is a significant engine of economic growth and social development.

BIAC MEMBER ORGANISATIONS (September 1999)

Australian Chamber of Commerce and Industry	Confederacion de Camaras Industriales de los Estados Unidos Mexicanos (CONCAMIN) (Mexican Confederation of Chambers of Industry)
Vereinigung Der Österreichischer Industrieller (Federation of Austrian Industry)	Confederacion Patronal de la República Mexicana (COPARMEX) (Employers Confederation of the Mexican Republic)
Fédération des Entreprises de Belgique (Federation of Belgian Industry - FEB-VBO)	
Canadian Council for International Business	Vereniging VNO-NCW (Confederation of Netherlands Industry and Employers VNO-NCW)
Confederation of Industry of the Czech Republic	
Dansk Industri (Confederation of Danish Industries)	New Zealand Employers' Federation
Dansk Arbejdsgiverforening (Danish Employers' Confederation)	Næringslivets Hovedorganisasjon (Confederation of Norwegian Business and Industry)
Teollisuuden Ja Työnantajain Keskuslitto (Confederation of Finnish Industry and Employers)	Konfederacja Pracodawcow Polskich (Confederation of Polish Employers)
Mouvement des Entreprises de France (MEDEF) (French Enterprises Association)	Associação Industrial Portuguesa (Portuguese Industrial Association)
Bundesverband der Deutschen Industrie (Federation of German Industries)	Confederacion Espanola de Organizaciones Empresariales (Spanish Confederation of Employers' Organisations)
Bundesvereinigung der Deutschen Arbeitgeberverbände (Confederation of German Employers' Associations)	Sveriges Industriförbund (Federation of Swedish Industries)
Syndesmos Ellinikon Viomichanion (Federation of Greek Industries)	Svenska Arbetsgivareföreningen (Swedish Employers' Confederation)
CEHIC (Confederation of Hungarian Employers' Organisations for International Cooperation)	Union Suisse du Commerce et de l'Industrie - Vorort (Swiss Federation of Commerce and Industry)
Vinnuveitendasamband Islands (Confederation of Icelandic Employers)	Union Patronale Suisse (Confederation of Swiss Employers)
Irish Business and Employers Confederation	Türkiye Ticaret - Sanayi - Deniz Ticaret Odalari ve Borsalari Birliđi (TOBB - Union of Chambers of Commerce, Industry, Maritime Commerce and Commodity Exchanges of Turkey)
Confederazione Generale dell'Industria Italiana (General Confederation of Italian Industry)	Türkiye Isveren Sendikaları Konfederasyonu (TISK Turkish Confederation of Employer Associations)
Keidanren - BIAC Japan (Federation of Economic Organisations)	Türk Sanayicileri ve Isadamları Dernegi (TÜSIAD - Turkish Industrialists' and Businessmen's Association)
Federation of Korean Industries (FKI)	
Fédération des Industriels Luxembourgeois (Federation of Luxembourg Industrialists)	Confederation of British Industry
	United States Council for International Business

