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Poullet, Yves

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Legal aspects of use of Internet by municipalities

"Views from Brussels"

Introduced by

Mr Yves POULLET
Dean of Namur Law Faculty
Professor at Liège Law Faculty
Director of the CRID

Introduction

1. The of organisers this colloquy asked me for a paper on the legal aspects of the use of Internet by municipalities, as the European contribution to the debate. I hope that this report complies with these parameters. It is primarily based on the European work of the Legal Advisory Board of DG Infosoc (LAB)[1] in this field, especially the PUBLAW reports[2], and the important work carried out by LAB in response to the Green Paper published by the Commission on exploitation of public law data[3]. Secondly, it uses the work of the FUNDP CRID, the fundamental thesis by Cécile de Terwangne[4] and the research conducted in the regional context, with a vade mecum drafted by the Union of Towns and Municipalities on the legal aspects of the use of Internet by municipalities[5] and also participation in the so-called PACE project aimed at studying the development of new "electronic" services by municipalities[6].

2. Municipalities can provide a large number of services on Internet. Two types of services are generally singled out[7], viz information services and transaction services. Information services cover all services facilitating access to information produced by the municipality, namely information on the municipal council's agenda, sectoral plans, day nurseries and their locations and rates, books available in the municipal library, etc. This information and advice can be made available on the Net via the municipal website, which may or may not have its own server.

Such information services may be combined with transaction services[8], from straightforward orders for forms, submitting a request for a building permit, reserving halls, etc, to concluding municipal public contracts. Such services, accessible via the municipal site, can be managed by means of so-called "one-stop shops".

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[1] For the work of LAB, see the LAB site at the following address: www.echo.lu/legal/en/access/access.htm, particularly the proceedings of the 1996 conference in Stockholm, "Access to Public Sector Information: a Key to Commercial Growth and Electronic Democracy" and the LAB-LAB positions on the Green Paper, April 99.

[2] For PUBLAW reports 1, 2 and 3 see aforementioned LAB site and C. de Terwangne, H. Burkert and T. Poullet (publ.), "Towards a Legal Framework for a Diffusion Policy for Data held by the Public Sector", Deventer-Boston, Kluwer Law and Taxation Publishers, Computer Law Series No. 14 , 1995, p. 93.

[3] European Commission, "Public Sector Information: a Key Resource for Europe", Green Paper on Public Sector Information in the Information Society, COM(1998)585, Luxembourg, OPOCE, 1999.

[4] C. de Terwangne, "Société de l'information et Mission publique d'information", a thesis presented in Namur on 21 November 2000, to be published.

[5] P Blondiau and V. Tilman with the co-operation of C. de Terwangne, "Vade-mecum sur les aspects juridiques de l'utilisation d'Internet par les communes", Guide prepared by CRID and the Union of Towns and Municipalities, November 2000. This vade mecum was produced at the request of the Minister of the Interior and the Civil Service of the Walloon Region.

[6] This projects is being conducted as part of the 5th IST programme by a consortium including Glasgow University, the FUNDP CRID, Télécities and various private enterprises. For legal and other aspects, see PACE site, http://www.pace.-eu.net

[7] See the summary of on-line administrative service types in the study conducted by D. Dieng, C. Lamouline and P. Gérard, "L'administration fédérale en ligne: quelles priorités?", a report submitted to the SSTC, Namur, in November 1997, especially pp. 20 ff.

[8] For instance, an information service on economic assistance available from the municipality for shopkeepers might comprise an advisory service (using, for instance, a decision support system) on the optimum support available and a transaction service by which downloaded applications forms for the assistance selected are sent electronically to the relevant municipal departments.

Municipalities may provide other services in addition to these first two types: an Internet access service for "underprivileged" population groups, operating in buildings open to the public; services for managing discussion forums on issues of municipal interest as part of what is usually called local "electronic democracy", and lastly such e-commerce services as hosting sites and certifying signatures, an area in which municipalities are in direct competition with private operators.

We shall confine ourselves to examining the first two types of service and their legal aspects.

3. The report begins by examining the legal aspects on information and advisory services, before going on to those of transaction services. The legal issues would appear to differ in each case. Placing information on line raises the following questions:

what information should be put on line?
what precautions should be taken from the threefold angle of competition, liability law and the right to privacy?
how can municipalities use intellectual property rights to protect their websites and the on-line information they contain?

Transaction services also call for other types of legal analysis: priority must be given to the question of signing by both the public and private operators, that of complying with formalities traditionally accompanying the conclusion of administrative acts, and lastly that of electronic payment.

Part One: Information Services

A. What type of information should be provided on line?

4. As we all know, national legislation in Europe is increasingly enshrining the principle of every citizen's right of access to administrative documents[9].

This right to administrative "transparency" as required by Article 10 of the European Convention on Human Rights covers all government departments, including municipalities[10], and also, since the adoption of Article 255 of the Amsterdam Treaty, the European institutions[11]. We have gradually progressed from a right of access solely to paper copies of texts, with regard to which the Administration only has a passive obligation, firstly to a right of electronic access[12], and secondly, and more importantly, to an active obligation on the part of the State (and government departments in general) to provide information deemed essential in both paper and electronic forms[13]. "Essential information" is defined as any information required for the citizen's participation in the Information Society.

5. This obligation is justified both by a civic concern (is not public information a sine qua non for facilitating public participation in social options?) and by the potential economic interest of such information for operators wishing to take an informed decision and also for those hoping to slightly "glamorise" their product[14].

It invites every municipality to discuss the content of the information to be placed on line with representatives of all interested "consumers" (ordinary citizens, enterprises, shopkeepers, and philosophical, parents' and other associations)[15].

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[9] Re. this legislative trend in Europe and America, see C. de Terwangne, aforementioned thesis, pp. 169 ff.; for compulsory "openness" at municipal level, see M Leroy, "La publicité de l'Administraiton dans les provinces et les communes", Droit communal, 1999/1.2, p. 93.

[10] For Belgium, see the Law of 12 November 1997 on public access to the administration in the provinces and municipalities (MB, 19.12.1997).

[11] In this connection, see the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents of 21.2.2000, COM(2000)30 final:2. On the European debate, see G. Papapavlou, "Public Sector Initiatives in the European Union", Infoethics 2000, Paris, 13-15 November 2000.

[12] Many countries have followed the example the United States, which amended the Freedom of Information Act in 1996 to permit electronic access and require the Administration to allow citizens to choose between a paper and an electronic copy of the desired document (on this Act, see B. Epps, "Electronic Freedom of Information Act Amendment of 1996", http://www.va.gov/oirm/news/art3_foia.htm).

[13] To quote Mr Jospin's phrase in his famous speech in Hourdin on 25 August 1997, "Preparing for France to enter the information society". It should be noted that this concern is in line with one of the objectives of "eEurope": "Guaranteeing easy access to at least 4 essential types of public data in Europe" ("eEurope 2002: An Information Society for All", Lisbon, 23 and 24 March 2000, Brussels, 8 March 2000 - COM(2000)130 final.

[14] These two concerns are very appropriately highlighted in the aforementioned Green Paper.

[15] On this method, see Y. Poullet, "Plaidoyer pour un (ou des) service(s) universel(s) d'informations publics", in "Access to Public Sector Information: a Key to Commercial Growth and Electronic Democracy", Proceedings of the Stockholm Colloquy, 27 and 28 June 1996, available on http://www2echolu/legal/Stockholm/webcome.html

This will no doubt involve publishing appropriately neutral information on Internet[16] not only on the action and policies of municipal authorities but also on administrative procedures, public services provided in the municipal area and basic data on municipal activities. So that users can easily find the desired information on the Internet site consulted, various search facilities should also be on offer (hierarchical table of contents, search engine, etc)[17]. We might quote the example of the 2 March 2000 Ministerial Decree of the Walloon Region[18], which makes granting of subsidies for creating municipal websites subject to a minimum density of information content[19]. The thesis recently submitted by Cécile de Terwangne explains and justifies the content of the Administration's information-providing role in the context of the information society. She also describes the requisite procedures and ad hoc bodies for fulfilling this role. We would refer readers to her conclusions[20]. We might note the parallel between the latter and the conclusions of the report by the President of the European Commission at the Lisbon Summit on 23 and 24 March 2000[21]: By the end of the year 2000 member States should have guaranteed easy access to a minimum of 4 essential types of public information, that is to say legal and administrative information, cultural information, environmental information and real-time information on traffic conditions and congestion.

B. Limits to the dissemination of data and precautions to be taken for such dissemination

a. Protection of personal data

6. Protection of personal data as enshrined in Directive 95/46/EC of 24 October 1995 of the European Parliament and Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data[22] must be uppermost in government departments' minds when developing information services, and a fortiori transaction services, relating to or based on their websites.

We are thinking here not only of the fact that information provided on websites may be personal in the broader sense of the term[23], but also that the use of on-line services generates

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[16] D. W. Schartum ("Access to Government-held Information: Challenges and Possibilities", The Journal of Information, Law and Technology, 1998/1, http:elg,warwick.ac.uk/jilt/infosoc/98_1scha/>, para. 4) stresses this need for neutrality and expresses concern about political manipulation in choosing documents placed on Internet: "It will be important to prevent the authorities from becoming too influential in determining which documents are published and therefore receive attention which can affect the political agenda".
[17]

[18] Ministerial Decree of 2.3.2000 awarding subsidies to the municipalities to create a citizen-oriented municipal Internet site.

[19] Eg access plan for municipal buildings, names of department members, information on public works under way, environment (including refuse collections), security, health, education and social affairs.

[20] C. de Terwangne, "La mission publique d'information dans le contexte de la société de l'information", thesis submitted to Namur Law Faculty on 24 November 2000.

[21] "eEurope, an Information Society for All", aforementioned communication, Lisbon, 23 and 24 March 2000, p. 2.

[22] OJEC, L 281, 23 November 1995.

[23] Article 2 (a) of the European Directive defines "personal data" as any information directly or indirectly enabling the individual concerned by the data to be identified. A so-called "anonymous" statistic which is too highly aggregated, such as the average income of household in a given village street, may constitute an item of personal data.

personal information. An example of the former case might be the publication of a list of municipal officials, and for the latter the storage of a file of persons having taken part in a discussion forum. It goes without saying that storage of such a file could reveal the political preferences of speakers and enable them to be targeted under a political marketing drive.

7. The former case has given rise to detailed commentaries from the Legal Advisory Board of the Commission's DG Infosoc, in reply to the aforementioned Commission Green paper[24].

The first step is to pinpoint cases where the purpose of publishing data on the Web is compatible with the original purpose of the data-gathering by the municipality. Such cases are few and far between. They are possible when legislation, eg in the environmental field, necessitates collecting and publishing specific data[25]. We cannot conclude from the existence of a right of access on demand to certain personal data that such data must be systematically accessible on the Internet site. Making data available on Internet increases the risk of data manipulation, particularly for marketing purposes.

Therefore it is proposed that:

> before making data available the municipality should carefully analyse the extent to which the availability of the data is in keeping with a public interest higher than that of the individuals in question to ensuring that their data remains confidential[26];
> the individuals concerned should be informed of such data publication and the purposes thereof, so that they can as far as possible consent, or indeed object[27] to this measure;
> lastly, technical measures should be taken to prevent the downloading and manipulation of data made available for consultation. For example, where a list of civil servants is being published, it is quite legitimate to restrict the data-base inquiry criteria[28].

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[24] See references mentioned in footnote 1 above. Readers might also like to refer to the arguments set out in Cécile de Terwangne's thesis, op. cit., TII, pp. 570 ff. See also Opinion No. 3/99 of 3 May 1999 to the Working Party on Protection of Individuals with regard the Processing of Personal Data on public sector information and protection of personal data - contribution to the consultation initiated under the European Commission's Green Paper (COM(1998)585), and Y. Poullet, "Commercialisation des données détenues par le secteur public et vie privée", DCCR, 1993, pp. 608-625.

[25] See the EC/UN Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in June 1998. It will be noted that these obligations are fairly exceptional and of little relevance to personal data.

[26] For example, complaints could be lodged, and upheld, against any community publishing the addresses of all its inhabitants.

[27] In accordance with Article 14 of the Directive, which entitles everyone to object, free of charge and without giving reasons, to the use of these data for marketing purposes.

[28] This is an application of the obligation (Article 16 of the Directive) to ensure data security. On this point see Opinion No. 3/99 of 3 May 1999 of the Working Party set up under Article 29 (of the Directive) on public sector information and protection of personal data; contribution to the consultation initiated under the aforementioned European Green Paper. See also Y. Poullet, "Commercialisation des données détenues par le secteur public et vie privée", DCCR, 1993, pp. 608-625.

8. Where the latter case is concerned, viz processing of personal data originating in the use of website services, the following principles might be adopted:

Principle No. 1: "minimising" the use of personal data, ie data should never be demanded or gathered where they are not required for the purposes of the service provided. For instance, gathering data for consulting purely informative pages does not necessitate information on the citizen's identity[29].

Principle No. 2: no municipal site can comprise cookies or other unfair information-gathering procedures[30].

Principle No. 3: proportionality. Only the data required for the purposes of the service can be requested.

Principle No. 4: security. In view of the increasing numbers of "one-stop shops", which are a kind of "security door" through which users must pass to submit requests to the municipality, steps are needed to ensure that each administrative department has cognizance only of data relevant to and necessary for its work and to prevent the departments managing "one-stop shops" from storing and processing the data any longer than is necessary to deal with the request. For example, if, in order to claim a rebate on refuse-collection tax, citizens are required to prove that they are in receipt of social welfare assistance, that their income does not exceed a given amount, etc, each department involved in processing the claim should have access only to the data they require.

b. Competition with private operators

9. Obviously, the introduction of information services by the public sector, and in particular by municipal departments, can affect the commercial interests of private companies that would like to develop the same information services. Examples of this are the many local newspapers and publishers who produce lists of civil servants, municipal programmes, town plans, etc.

In this connection LAB[31] considers that government departments must encourage source diversity, and that according to the very principles of European competition law they can only hold such specific rights in excess of ordinary law as are required to conduct tasks of general public interest[32].

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[29] On the other hand, if the citizen in question wishes to make a transaction, information is required on his or her identity.

[30] The United States recently prohibited the use of such procedures on all Federal Administration sites.

[31] LAB - aforementioned Position on the Green Paper on Access. See also the US Paperwork Reduction Act of 22 May 1995 (44 USCA s 3506(d)), which argues in favour of source diversity and therefore against public-sector monopolisation of information. It also recommends allowing private operators to reuse information. On this particular point, see H.H. Perritt, "Reinventing Government through Information Technology", in the aforementioned Proceedings of the Stockholm Conference.

[32] Art. 86 of the Treaty of the European Union.

This means that municipal departments to restrict the information they place on line and that whenever private operators are in a position to improve on the service, they must refrain from restricting the right to reuse the data in question[33].

The "hijacking" of advertising resources by government departments is also relevant in this connection. These authorities may be tempted to rely heavily on private-sector advertising in developing their sites[34].

c. Municipal liability in respect of information or services provided

10. A municipality's liability in respec of information provided on-line can be incurred if it publishes libellous, out-of-date or false information on a municipal event: the victim of the libel or the mistake can claim damages from the municipality or private information provider. To save time we shall just make a few general comments[35]:

municipal departments may include clauses specifying the limits on their liability, frequency of updating and authors of the information in cases of straightforward data transmission, and the internal procedures for checking information quality. It is important that these clauses be clearly and prominently stated at points on the site where the user is bound to see them;

a municipality's liability may be increased when it provides on-line discussion services for free expression by citizens. A supervisor should be available to prevent citizens from using such facilities to disseminate slanderous comments or remarks irrelevant to the purpose of the list (especially electoral advertising).

Whenever children and young people can access the sites or discussion forums, the municipality must use filters to protect them[36].

lastly, it is very important for municipalities to "certify" their information pages with a forgery-proof symbol. Certain private operators have recently been disseminating false information claiming that it is official. When accessing so-called official information, citizens must be able easily to authenticate its official status by ascertaining that the pages consulted really are part of the municipality's official site. It would be easy to guarantee such authenticity by giving users automatic access, by clicking on the municipal symbol, to the municipal certification via a forgery-proof link.

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[33] See B. Nouel, *Le droit de la concurrence et les données publiques*, GP, 1997, Doct. P. 5.

[34] The French position is as follows: in the absence of a specific position on the Internet, reference can be made to the CCDA's position on written publications by government departments, to the effect that they must not comprise commercial advertisements. On the other hand, so-called 'non-commercial' advertising can be published provided it is in the public interest and is published in the context of an activity in the general interest. For example, advertisements can be included in such publications on information campaigns and major national causes".

[35] Readers wishing for further details should see Sieber (publ.), *Liability Issues for On-Line Data Bank Services in the European Community*, CH Beck Verlag, Cologne, Berlin, Bonn and Munich, 1992.

[36] See the recent decision by the European Council to combat child pornography on Internet, adopted on 29 May 2000 and the Commission's Green Paper of 16 October 1996 on the Protection of Minors and Human Dignity in Audiovisual and Information Services. See also M. d'Udekem-Gevers, Y. Poullet, *User's Empowerment: Protection of Minors v. Freedom of Expression*, article to be published.

C. Intellectual property and municipal sites

12. This problem has two facets which must be addressed separately:

the first is the fact that the municipality may wish to use other people's work in creating its website and developing the relevant information;

the second arises downstream of the utilisation by third persons of information or images available on the municipal site.

In the former case the municipality wishes to use someone else's work, while in the latter it wishes to protect its own work against use by someone else. In the latter case we shall go briefly into the problem of the right to domain names.

a. Negotiating others' rights for the benefit of the municipality

13. On this point we will simply reiterate a number of general principles.

Despite the fact that it is financing the development of the Website, the municipality has no rights vis-à-vis the creation financed if it is protected by copyright as a work. However, the municipality does retain the right to use it. A distinction must be drawn between two different situations, viz when the Website is created in-house, and where the municipality call on an outside individual or agency to design its site.

In the former case when the municipality is developing its website or a given product (apart from software programs) in-house, it must ensure that the contract of service of the employee(s) carrying out the creative work contains a detailed clause on transfer of rights.

In the latter case the municipality has enlisted the services of an outside specialist. It is sometimes particularly difficult here to pinpoint the holder of the intellectual rights: is it the municipality or the third person? In fact, the actual creator of the product holds copyright over the site, not the party technically operating the site. At all events it is always useful to include a clause on transfer of copyright in the contract for the development of the website in order to prevent any subsequent disputes (see section on website creation and housing of websites).

Ideally, if it is to be able to freely operate and develop its site the municipality would be well advised to provide for transfer of all the following rights:

public broadcasting rights: making data available on the Web is an act of public broadcasting;
reproduction rights: placing the site on line and operating it require reproductions (eg for recording from one medium on to another);
adaptation rights: development of the site and generally any type of change made to the product;
translation rights, including both translation from one computer language into another or translation into various human languages.

It is seldom necessary to obtain rights vis-à-vis the programming code, which is usually the designer's property.

Transfer of rights must be set out in writing. Since the clause is interpreted restrictively, the written document stipulating the transfer of ownership rights to the employer must describe in detail the items to be transferred[37].

Furthermore, incorporation of information, sounds or images (eg logos, photographs of municipal buildings) coming under a third person's ownership rights requires the latter's authorisation in respect of public communication and broadcasting rights[38].

b. Intellectual property rights held by the municipality in respect of its website, including the domain names issue

14. As we know, the adoption on 11 March 1996 of Directive 96/9/EC on the Legal Protection of Databases[39] considerably increased the scope of legal protection for intellectual property. Investment in creating and protecting a database is now protected by a *sui generis* right[40] which applies both to text databases and to multimedia products that fall short of the originality threshold required to qualify for copyright protection.

Clearly, the public authorities could rely heavily on this right and other more conventional intellectual property rights in order to restrict reuse of, or even access to, their databases[41].

Legislation in such countries as France and Belgium prohibits the commercial exploitation of data obtained through access rights, with reference to Government copyright.

15. Without following in America's footsteps[42] and advocating the abolition of copyright or intellectual property rights for works produced by the public sector, we might nevertheless recall that intellectual property rights cannot be used to undermine the exceptions provided for by the regulations on intellectual property rights based on guaranteeing respect for such fundamental freedoms as the right of access[43]. This is the reasoning behind the LAB arguments[44] in favour of establishing an exemption from copyright and the *sui generis* right vis-à-vis legislative, administrative and legal databases, ie databases providing "essential"

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[37] Readers might refer to the Vade mecum published by the Belgian CRID and UVC, mentioned in a previous footnote.

[38] See M. Buydens, *Droits d'auteur et Internet*, report for SSTC, available on http:/www.belspo.be

[39] OJCE, 27 March 1996, No. l77, p. 20.

[40] The holder of this *sui generis* right can prohibit the extraction and/or total or partial reuse of the content of the database.

[41] See A. Strowel, *Publicité de l'administration et droit d'auteur*, Droit communal, 1999, 1-2, 63-70.

[42] See 19888 Copyright Design and Patents Act, Section 101 of which prohibits copyright for any "work of the US Government".

[43] There is an inevitable conflict between copyright, which increasingly resembles a right of control over information, and freedom of expression and information. The tension between "rights over information" and the right to information is liable to intensify in the coming years within the information society (A Strowel, aforementioned article, p. 67).

[44] Aforementioned LAB position, nos. 58 ff. See also S. Dusollier, Y. Poullet and M. Buydens, *Droit d'auteur et accès à l'information dans l'environnement économique numérique*, Colloque Infoéthics, Paris, 13-15 November 2000, published on the UNESCO site.

information[45]. This issue of exceptions to intellectual property rights is obviously at the heart of the discussions on adoption of the European Directive on the Harmonisation of Certain Aspects of Copyright and Neighbouring Rights in the Information Society[46].

16. Where domain names are concerned, the issue at stake is the potential conflict between a municipality wishing to register a domain name incorporating its own geographical name and a private operator who has already registered this domain name. We know that the rule has until recently been "first come first served", with no consideration for the public interest. This has meant that the municipality must first of all ascertain whether the domain name has already been assigned. The increasing instances of "domain name grabbing", ie unfair registration aimed at prior appropriation of names without necessarily ever using them, has induced the ICANN (Internet Corporation for Assigned Names and Numbers) authorities, which deal with assigning general domain names, and WIPO[47] to grant certain advantages to parties with trademark rights to a name and to reject those using a domain name in bad faith or without a legitimate interest.

Of course municipalities do not necessarily hold trademark rights. Accordingly, the European authorities must take a decision to authorise *ex officio* reservation of the corresponding domain names for municipalities[48] and standardise municipalities' domain names[49].

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[45] See aforementioned thesis by C. de Terwangne.

[46] The initial proposal by the Commission on 10 December 1997 has been discussed many times since. A final vote on the text is expected by the end of the year. The latest draft is apparently more in favour of the exceptions mentioned here.

[47] See G. Haas and O. Tissot, *Propos sur les conflits entre noms de ville et noms de domaine*, available at http://www.juriscom.net/chronique/saint-tropez.htm.

[48] The Italian authorities, for instance, have reserved *ex officio* domain names corresponding to the names of Italian municipalities exclusively for these municipalities.

[49] See F. de Villenfagne, "Public administration on the Internet and e-procurement", PACE report available on aforementioned PACE site (footnote 6).

Part Two: Transaction Services

17. Municipalities may offer an electronic service for certain formalities, enabling people both to download documents, such as application forms for planning permission, and to return the documents after completion, even including any attachments. Municipalities may also provide an electronic service for sending certain documents (birth certificates, population register extracts, and so on) and for carrying out certain transactions (such as booking rooms or ordering dustbin liners).

Two main problems may arise:

> Certain statutory formalities have to be complied with for some transactions, or for some of these transactions. Not only are applicant and municipality required to append a signature, but there are also specific formalities required by some administrative regulations, such as evidence that stamp duty has been paid, use of registered mail, specified document format, and so on.
>
> The problem of payment, in this instance by electronic means, also has to be solved.

A. Signatures and administrative formalities

18. Article 9 of the European directive of 4 May 2000, which covers certain legal aspects of electronic commerce, invites member states to remove any obstacles in the form of regulations which might lead to discrimination against the use of new technologies.

In other words, each state should define for every level what functional equivalent in the electronic sphere is appropriate to the *ratio legis* of the prescribed formality. For instance, if a municipal regulation requires one kind of document to be submitted by registered mail, this requirement may be considered to have been met if the document is sent by a registered electronic mail service provided by a Trusted Third Party, one that guarantees reliability and security, and is capable both of attesting receipt in the municipality's electronic mailbox and of sending confirmation of receipt.

It is self-evident that electronic means already exist to reproduce the "formats" sometimes required for certain documents and to show certain clauses in bold characters.

19. The concepts of signature and writing have of course traditionally involved handwritten signatures and paper as the material on which they appear.

This traditional connection is clearly cast into doubt by international texts which assert the value of electronic signatures and electronic documents, provided that these fulfil the same functions as their paper counterparts. An e-mail may thus be considered to be written in so

far as its content is both legible and accessible to its addressee, and provided that its content also offers a certain stability[50].

Where electronic signatures are concerned, the identification and authentication functions which are the essence of the handwritten signature can, as we know, be fulfilled through the use of asymmetric cryptographic techniques based on the use of pairs of keys (one private, one public), combined with the intervention of certification authorities. The last-named are Trusted Third Parties whose main task is to issue a certificate formally linking the person and his/her public key.

20. The European Commission adopted a proposal for a directive on electronic signatures on 30 November 1999[51]. This directive was introduced to achieve two main purposes: the legal recognition of electronic signatures and the creation of a legal framework for the operations of certification service providers.

Firstly, the directive considers "advanced" electronic signatures to be equivalent to handwritten signatures in respect of their legal effects, provided, however, that they meet the various conditions set down in the directive (it should be noted that, although no reference is made in the directive to a particular signature technique, it is clear that, at the present time, only the digital signature technique corresponds to this concept of "advanced electronic signature"). Noteworthy among the conditions that advanced electronic signatures have to comply with are:

a minimum content has been set for the certificates on which such signatures are based;
the certification authorities issuing such certificates must meet various requirements;
the creation and verification of signatures are subject to various conditions.

Should one of the conditions not be met, the directive provides that, even if the electronic signature cannot be considered the equivalent of a handwritten signature, it nevertheless has to be regarded as admissible. It is, however, the responsibility of the person using such a signature to persuade the court of its evidential value.

Secondly, the directive is intended to set up reliable certification machinery. As we have seen, the intervention of the Trusted Third Parties is vital, to guarantee that the electronic signature is used efficiently and reliably. This machinery depends on three main points:

the responsibility of the Trusted Third Parties, the certification authorities;
the protection of personal data;
the recognition, in certain conditions, of the certificates issued by third countries.

There exist today certain technical signature mechanisms guaranteeing BOTH the identity of the electronic signatory AND the integrity of the message signed.

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[50] On the concept of writing, see Y Poullet and M Antoine, "Vers la confiance, ou comment assurer le développement du commerce électronique?", in the proceedings of the "Journées du notariat" colloquy, Brussels, 14 and 15 September 2000, "Authenticité et notariat", No. 14 et seq, and the references therein to the work of the UNCITRAL.

[51] Directive 1999/93/EC of the European Parliament and of the Council, of 13 December 1999, on a Community framework for electronic signatures, OJ, L 013, 19 January 2000, pp 12-20.

In practice, the steps to be taken are:

a certificate has to be obtained from a certification authority. That authority checks the signatory's identity, issues and signs the certificate and stores it in an electronic register;
electronic signature software has to be installed;
the software has to be trusted to generate a pair of keys (one private, the other public).

The missing link is Belgian legislation transposing the principles of the directive into the applicable Belgian law. A bill is under consideration and should be adopted in the very near future.

This forthcoming legislation is nevertheless unsatisfactory wherever legislation or a regulation specifies the need for "paper formalities". In practice, the law merely regards as equivalents (in certain conditions) the electronic signature and the handwritten signature.

21. Thus the setting up of transaction services by municipal authorities requires:

the municipality clearly to define the level of security that must be met by the electronic signatures of anyone wishing to make use of the authority's transaction services. Are these advanced electronic signatures, or not? Clearly, in this context, the municipality cannot introduce in respect of the use of electronic means security requirements which it did not already impose in the paper environment. For example, authentication, even electronically, of a signature cannot be a requirement if this was previously unnecessary.

the municipality, with the assistance of its chosen certification authority, internally to define the content of its own certificates and the procedure for issuing them. The important thing in a transaction with a municipal authority is very often the status of the official effecting the signature (deputy mayor in charge of the civil status register, municipal secretary, etc). The citizen of an authority who engages in a transaction with that authority wishes to be sure that the person signing the document on the authority's behalf really is the competent person.

It is therefore important for the municipality to take care to issue certificates attesting at a given date staff members' official powers. And it must ensure that such certificates are updated when staff are moved, promoted, or their duties taken over by another member of staff.

lastly, the municipality to draw up for the attention of anyone using electronic means to carry out transactions with it regulations specifying the municipality's procedure for dealing with applications, eg the automatic issuing of receipts reiterating the content of the application, authorised payment methods, the time which will be needed to process the application, and so on.[52]

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[52] In this context, cf the French example, in "Bien répondre au courrier électronique des citoyens, un pari pour une administration moderne", Délégation interministérielle à la réforme de l'Etat, available from http://www.internet.gov.fr/français/index.html.

B. Payment

22. Numerous payment instruments and systems exist for payments via the Internet. Credit or debit card numbers are frequently quoted, a high-risk system, for the low level of security on the Internet network entails the danger of any information supplied being intercepted and used by unauthorised third parties. It should be noted that, according to the European recommendation of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, the issuer of an unsecured means of payment bears the risks of unauthorised use.

Other, more secure, payment systems have been devised, with automation of the means of payment, after the server has checked that the user's bank account contains sufficient funds.

These more sophisticated systems may be used only if the municipality has concluded a contract in advance to ensure that the issuer's server will generate for the municipality's benefit the private and public keys, so that the user is sure who the beneficiary of the payment will be (in this case the municipality), and the payment is secure.

The use of such systems requires the municipality to install appropriate software and the user to have a card reader available. The keying in of a secret code, combined with the reading of the card, enables the server to identify the user.

A final possibility is that of using reloadable cards, on which units of value are stored and downloaded at the time of payment, via a card reader linked to the user's computer.

Conclusions

23. The law is often thought to curb the adoption by public and private bodies of technological innovations. In this case, it does no such thing. We believe, for instance, that we have demonstrated, as far as the use of the Internet for transaction services is concerned, that:

> of course (but on some minor points), certain regulations might curb municipal authorities' use of technological progress. Certain formalities, for example, connected with the use of paper documents may prevent the development of electronic transaction services for use by citizens and municipalities. We have indicated what can be done to solve this problem.
>
> on the other hand, the law has rapidly added to its traditional concepts the results of new technologies. Now that signatures may be electronic, and written documents can take the form of electronic documents, there is no longer any obstacle, in most cases, preventing possible use by state and municipalities of electronic means to conduct transactions with citizens, in a way which is not only safer and speedier, but also probably more economical for both parties.

24. The law has proved not to inhibit, but to encourage the development of information technology-based services, while providing for this development an appropriate framework, especially for the protection of privacy and for competition.

The administrative transparency required by the law takes on a new meaning in a virtual world. What is more, the precedents set by the Council of Europe, in particular, impose on the various public authorities a real duty to keep their citizens informed. The aim is to guarantee genuine participation by citizens in public decision-making. This is a particularly honourable concern at the municipal tier, the first level at which citizens can play a role in their society.

Yves Poullet
Dean of the Faculty of Law, Namur
Professor at the Faculty of Law, Liège
Head of the CRID
yves.poullet@fundp.ac.be
http://www.droit.fundp.ac.be/crid.htm

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