

# **INTERNET MARKETPLACES AUCTIONS AND EXCHANGES ON-LINE EXCERPT FROM DRAFT 2001-05-18**

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## **1 Introduction**

Many believe that the technical possibilities of establishing huge meeting places on the Internet with the purpose of assembling the world wide supply and demand of almost any kind of product will create a revolution for business. The fact that the Internet makes it possible to easily gather a large amount of the supply and demand and thereby establishing increased liquidity in the markets, will likely lead to a substantially increased use of auctions and exchanges on-line. If this prediction comes true, businesses will face a tremendous change as how to sell and buy products and services. New questions of legal nature that will follow such changes in business concepts will be analysed in the study.

The Internet marketplaces described in the book are closed communities, i.e. a website that can only be accessed after a subscription procedure. The marketplaces I examine are not open to everybody, but participation is based on a contractual relationship between the participant and the marketplace operator. The marketplaces' level of service may run along a spectrum from being only on-line notice boards where sellers and buyers having found each other negotiate the transaction off-line; to electronic procurement systems; and to the most sophisticated providing all services, including logistics, credit referencing, payment guarantees and insurance. A particularly interesting type of Internet marketplace is the emerging Internet auctions and exchanges.

There already exist ample examples of Internet sites, which may be operated by an independent intermediary or by be set up by the offeror. Examples of interesting exchange sites are MetalSite, e-STEEL, PaperExchange, CATEX (for insurance), Chemdex (for chemicals), Omnexus (for thermoplastics), FruitLine (for fruits and vegetables) and National Transportation Exchange. Examples of interesting auction sites are E\*bay (where consumers offer used goods to consumers), Bidlet (where new manufactured goods are offered to consumers), GoIndustry.com for used surplus equipment, and the site Covisint, where the car manufacturers Daimler-Chrysler, GM, Ford, Renault and Nissan ask for offers in competition by suppliers of goods and services (reversed auction). The book focuses on the design of optimal rules and norm-structures for conducting business at such marketplaces.

This study aims at explaining the legal dimension related to building trust at on-line auctions and exchanges. Traditionally, the national legislature has been

anxious to protect trust.<sup>1</sup> Auctions and exchanges require *trust*. There must be trust with respect to the following: Liquidity, accurate information, competition, equal treatment of bidders, rational behaviour by bidders, and firm rules so that bidding strategies can be used efficiently. When the basic trust is not at hand negative effects appears in the price setting mechanism.

If the participants cannot be certain that there are objects offered and a potentially substantial numbers of bidders (liquidity at the marketplace), the price setting mechanism will not be efficient and participants will hesitate to participate. If information provided at the marketplace is not trustworthy, participants will run the risk of making wrong decisions and consequently refrain from participation at the marketplace. If the bidders are not participating on equal terms the price setting mechanism will be affected and participants will not dare to participate. If participants are allowed to use bidding strategies that manipulate the price setting mechanism (and act irrationally), the participants will not trust the marketplace and therefore refrain from participation. If the rules are not firm, but can be changed or used with “flexibility”, there is a risk of manipulation and, consequently, the marketplace will not be able to attract participants.

Due to the lessened influence of the national state, it becomes important that the Internet marketplace *itself* is focused at the protection and design of efficient rules for the marketplace. The operator of a marketplace cannot rely on the national state to effectively secure the confidence in the marketplace, but must to an increased extent secure this interest by itself. This is mainly done via the Membership Terms, the Conditions of Sale and the technical structure of the Internet marketplace. The book shows how Internet marketplaces interact with national states. In this lies an important delimitation: I am not examining the Internet as a whole, but only the rules related to closed Internet marketplaces where commercial dealings are carried out.

The idea to determinedly *design* rules for a marketplace is rather new. Such norms have historically developed slowly by a process involving actual behaviour, the power structure of involved parties and the power structure of society as a whole. It must be emphasised that the operator of an Internet marketplace is similarly restricted in the design of the rules for its marketplace. It is rather a question of codifying the participants' expectations and already existing behaviour, than inventing totally new regimes.

### 1.1 The transition towards the Internet marketplace and electronic auctions

In the traditional market there are barriers against attracting many participants due to *time* and *geographical location*. The participation in traditional auctions could be very costly (and as a total inefficient) due to bid preparations costs, exposure constraints (total amount of bids submitted) or portfolio motives.<sup>2</sup> At an Internet marketplace the bidders may submit bids 24 hours a day, 365 days a year from

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<sup>1</sup> Lee says that the broad goals of regulators of financial and commodity markets typically are investor protection, economic efficiency, fairness, market integrity, and the minimisation of systematic risk. Ruben Lee, What is an Exchange? The Automation, Management and Regulation of Financial Markets, Oxford University Press, 1998, p. 251. All these goals seem to boil down to the ambition to protect trust in the marketplace.

<sup>2</sup> Robert Wilson, in Palgrave's, p. 198.

anywhere in the world. Internet auctions are non-costly – the bid preparations are minimal and there is normally no reason to restrain the amount of bidders.

From a theoretical point of view it is thus easy to understand that there are great forces towards increased use of auctions on-line. Already in 1967 it was stated that electronic auctions were not at all a new phenomenon.<sup>3</sup> As pointed to above, on-line auctions cover commodities, financial products, metals, agricultural products, unique items of fine art, manufactured goods (to GM and Ford), travels, insurance, surplus goods, damaged goods, space in containers, trucks, used cars and ships. There are also wholly automated processes based on auction within the area of power distribution where no human interaction exists.

Naturally, there are also forces acting against the increased use of on-line auctions. The changed roles of the intermediaries in business is such a force. The uncertainties related to the anonymity is another factor hindering the development. Furthermore, the increased transparency may lead to a lack of interest in participating at bid on-line marketplaces. It has been said that if you make markets too perfect, there is a good chance most people won't want to participate in them.<sup>4</sup> Another problem related to auctions is that it is complicated to have elaborated negotiations on other terms than the price.<sup>5</sup>

#### *1.1.1 Effects of the Transition to the Electronic Auction*

Auction is a means to prevent exploitation by distributor-buyers.<sup>6</sup> And conversely, auction is not a functional system in areas where distributors control producers. As they control sales, they can dominate the producers, who, once they are financially obligated to the distributors, must sell to them. Making auctions available in underdeveloped countries may serve as an instrument to ease up economic slavery by creating an open market mechanism.<sup>7</sup>

It used to be that the goods sold at the auction were only a fraction of the total supply, but that the auction price still influenced the whole market by serving as a reference price for negotiated deals.<sup>8</sup> Furthermore, when on-line auctions is an available alternative, it is presumable that fewer transactions will be individually negotiated, since at least one of the parties normally would be able to see that it can make a better deal at the on-line auction as compared to the individual negotiation.

The Internet has provided a forceful tool to change the price-setting mechanisms in trade. An evolution from manufacturer controlled market value to electronic markets is anticipated. Some believe that fixed prices will be an artefact of history. Fixed pricing is a recent phenomenon and the case for dynamic pricing is

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<sup>3</sup> Cassady, Ralf JR., *Auctions and Auctioneering*, University of California Press, 1967, Chapter 14, Modern Communication Systems.

<sup>4</sup> Mr Nalebuff in NYTimes.com, December 13, 2000.

<sup>5</sup> The International Chamber of Commerce in Paris is elaborating a contract formulae that will facilitate negotiations in a standardised electronic environment.

<sup>6</sup> Cassady, Ralf JR., *Auctions and Auctioneering*, University of California Press, 1967, pg. 38.

<sup>7</sup> Cassady, Ralf JR., *Auctions and Auctioneering*, University of California Press, 1967, pg. 40.

<sup>8</sup> Cassady, Ralf JR., *Auctions and Auctioneering*, University of California Press, 1967, pg. 42. Now this reference price is available on a global scale (if there is general access to the information at the marketplace). Only access can be allowed if a fee is paid.

compelling to both buyers and sellers. Also formerly dynamic price-markets will change from formerly being characterised as having very high amplitude moving in big waves, to a lower amplitude of smaller and quicker waves. The brokers whose role it was to function as an aggregator of disparate buyers and sellers will soon be transformed into a marketplace – an exchange or auction. The broker's former platform was himself and his connections. At an Internet marketplace these functions are automatically available. In this study I will describe some of the basic features of price-mechanisms based on auctions and exchanges and analyse what impact this may have on general trade law.

Conducting an auction is an efficient way to determine the price that best balances supply and demand, but it requires assembling all potential bidders in one setting. "The challenge is to make the Net serve the variety of ways people conduct transactions" Professor Varian said, "rather than force people to conform to one model that happens to be easy to do on the Net. Moreover, price-driven auctions are most useful for either one-of-a-kind items or standardized commodities traded in large volume. Most business deals, however, involve differentiated goods and services, turning on factors like quality, convenience and reliability as well as price. "All this economic theory that once was dismissed as too esoteric", Professor Varian said, "is suddenly becoming the basis for a variety of promising new business models."

## 2 The Autonomous Nature of the Electronic Marketplace

### 2.1 Introduction

An electronic marketplace can be managed from anywhere and simultaneously from many places. This makes it possible for the marketplace operator to choose its own jurisdiction.<sup>9</sup> In theory, it may even choose to have no jurisdiction at all – to be wholly independent and located only in Cyberspace. There is an enormous potential for the operators of marketplaces to design the norm-structure independently of the national state. This might be perceived as a valuable freedom. But the autonomy also has costs. An Internet marketplace can no longer rely on the help of the national state and, consequently, must solve problems that were formerly solved by the national state. In this chapter I will describe the national state's power, and its function for and relation to Internet marketplaces.

It is essential to emphasise that my study is merely aimed at commercial transactions in closed communities (marketplaces). There has been a vivid general debate concerning the autonomous Internet as a whole (including every legal aspect of the Internet such as child pornography, privacy, free speech and so forth). My analysis is limited to only cover transactions made at a marketplace allowing access only for participants and the substantive terms of these transactions (typically contract law, the law of sales and services and, to some extent, consumer law). In areas outside such transactions the national legislator may fulfil wholly different functions and have different means of exercising control and making legislation efficient. The following analysis does not attempt to be anarchistic and plead for a wholly unregulated Internet. I simply want to show that for commercial transactions traditional national regulation might to some extent be efficiently substituted by self-regulation and that self-regulation indeed is necessary due to the decreased power of the national state.

From a general point of view the development of norms in the Internet society is interesting. Nihoul says with reference to the industrialist society "...the legal system was regarded as a body of binding sentences expressing a project designed by a central authority. That project was supposed to become reality, i.e. to be implemented by the members of society under the threat of sanction."<sup>10</sup> As opposed to the industrialist concept of the legal system, the information society does not build on centralisation. It is rather a question of dispersion of decision making power. The fact that law is not principally created by public authorities is not against democracy. On the contrary, it is in harmony with the basic concept of democracy since it provides a possibility for citizens to participate in the norm making process.<sup>11</sup> The norm design of Internet marketplaces is an example of decentralised law making where territoriality matters less. It has been said:

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<sup>9</sup> The operator or "owner" of the marketplace could be anybody; former intermediaries, participants or wholly independent persons.

<sup>10</sup> Paul Nihoul, Will electronic commerce change the law? In *Regulating the Global Information Society*, ed. Christopher T Marsden, Routledge, 2000, pg 79-90 at p. 82.

<sup>11</sup> Paul Nihoul, Will electronic commerce change the law? In *Regulating the Global Information Society*, ed. Christopher T Marsden, Routledge, 2000, pg 79-90 at pp. 82-83.

“Maybe we are moving back to the medieval system, which was non-territorial in so far as territoriality was not the defining characteristic of organization. Political rule was not premised on territorial delimitation. Feudalism, the Church and the Holy Roman Empire represent three different organizational forms in the Middle Ages, which lacked territorial fixity and excessiveness.”<sup>12</sup> It is fairly easy to see the Hanseatic League as equivalent centres of powers to the emerging Internet marketplaces. They were non-contiguous and lacked borders. They were functionally rather than geographically integrated.

## 2.2 How the National Governor’s Power is Limited at the Internet

It has often been pointed out that the globalisation limits the power of the national state. When companies and persons are able to choose from where to conduct their transactions, the legislator’s ability to regulate markets is lessened.<sup>13</sup> National states used to be able to steer business behaviour. Nowadays, the national state instead is anxious to enact legislation that attracts business. This has been called the “race to the bottom”, meaning that states try to attract business by abolishing rules that protect weaker parties. We know of this phenomenon from earlier experience in relation to shipping and “flags of convenience” i.e. ships carrying the flags of the countries providing the most favourable rules. This experience shows how complicated it is to prevent the “race to the bottom” when states begin to compete with one another in order to attract business.

There are, however, also in the era of globalisation possibilities left for the national state to reach out more or less effectively in cyberspace.<sup>14</sup> In order to present an accurate picture of the power of the national state in the era of Internet and globalisation, these means must be acknowledged.

1. The national states may collaborate and create *international treaties* that apply world wide.
2. Important states may *boycott* states that provide safe harbours for unwanted business behaviour.
3. The national state may *forbid its citizens to do business* at unwanted Internet marketplaces (see for a comparison the U.S. restrictions on trade with Cuba).
4. There is also a possibility to influence the behaviour of cyberspace activity by threatening to *shut down the URL-address* of the Internet marketplace via the ICANN and its subdivisions.

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<sup>12</sup> Jönsson, Christer, Tägil, Sven, Thörnqvist, Gunnar, Organizing European Space, SAGE Publications, 2000, p. 66. See also Barlow, J.P., Thinking Logically, Acting Globally, (1996) Cyber-Rights Electronic List, 15 January, saying: “...the Internet is too widespread to be easily dominated by any single government. By creating seamless global-economic zone, borderless and unregulatable, the Internet calls into question the very idea of a nation-state.”

<sup>13</sup> See for example the problems in relation to the French state’s attempts of forbidding the part of the yahoo!-auction website providing Nazi materials to be accessible to French users, Paula Selis & Anita Ramasastry & Charles S. Wright, Bidder Beware. Toward a fraud-free marketplace – nest practices for the online auctions industry, a Report for the State of Washington Attorney General’s Office, p. 24.

<sup>14</sup> The Internet is by no means impossible to regulate. See, Christopher T Marsden, Introduction: information and communications technologies, globalisation and regulation, in Regulating the Global Information Society, ed. Christopher T Marsden, Routledge, 2000, pg 2 with references to A.M. Florini, Who does what? Collective action and the changing nature of authority, Chapter 1, pp.15-31 in Higgot R., Underhill, G. And Bieler, A. (eds) Non-State Actors and Authority in the Global System, Routledge.

5. The national state may by co-operative means facilitate *self-regulation* and direct it in desirable directions, by for instance developing self-regulatory agencies, codes of conduct, and rating systems.<sup>15</sup>

These different means of the national state to reach out in cyberspace entail large political efforts and sometimes entail work for a substantial period of time. It is highly plausible that the national state will be much less regulatory in the future due to the practical problems of effectively executing national regulation. While acknowledging that there is still some power left to the national state of effectuating legislation in cyberspace, it is clear that the national state in practice must be much more careful before introducing new regulations, since it entails substantially more efforts to make the regulation practically effective. The debate as to what extent the power of the national state is limited is extensive and will not be analysed in depth here.<sup>16</sup> My main concern is to show that marketplaces nowadays to a larger extent must protect their interests without relying as much on the help of the national state as they used to.<sup>17</sup>

### 2.3 The Relationship Between the Internet Marketplace and the National Governor

It is fascinating how little support from a national governor an electronic marketplace needs. Formerly, many business transactions were dependent on the latent threat of violence which the national governor had the monopoly of exercising.<sup>18</sup> In effect this power consists of execution of obligations and to put people in prison (and in some countries, indeed killing people). Naturally, there are many other and complex reasons why people obey norms. Studies in economics have shown how important it is for a state to prosper that the governor has the power to ensure the basic rights of ownership. The idea of the national state is that its power is *ultimately* ensured by exercising the monopoly of physical violence (luckily it is rarely used in practice).

An Internet marketplace, however, could function rather well without a structure based on the latent threat of violence. The Internet marketplace has at its disposal a more sophisticated - but yet more powerful - sanction than violence; access denial. A participant acting against the rules set up by the marketplace can be excluded from the marketplace.<sup>19</sup> If the marketplace is dominating in its field the access denial makes the excluded participant "cyberspace handicapped". A parallel can be drawn to more primitive societies, where misbehaving members

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<sup>15</sup> See for instance, Monroe E. Price and Stefan G. Verhulst, In search of itself, in *Regulating the Global Information Society*, Christopher T Marsden (Ed), Routledge, 2000, pp. 57-78.

<sup>16</sup> See Johnson, David R., and Post, David G., *The Rise of Law in The Global Network in Borders in Cyberspace*, Ed. by Brian Kahin and Charles Nelson, MIT Press, 1999, p.12, pointing to the likelihood that local regulatory structures will be superseded by new structures that better fit the online phenomena.

<sup>17</sup> See for an introduction, *Regulating the Global Information Society*, Christopher T Marsden (Ed), Routledge, 2000, *passim*.

<sup>18</sup> Apart from some minor exceptions.

<sup>19</sup> See Johnson, David R., and Post, David G., *The Rise of Law in The Global Network in Borders in Cyberspace*, Ed. by Brian Kahin and Charles Nelson, MIT Press, 1999, pp. 22 and 31; Robert L. Dunne, *Detering Unauthorized Access to Computers: Controlling Behavior in cyberspace Through a Contract Law Paradigm*, 35 *Jurimetrics J.* 1, 12 (1994); Paula Selis & Anita Ramasastry & Charles S. Wright, *Bidder Beware. Toward a fraud-free marketplace – nest practices for the online auctions industry*, a Report for the State of Washington Attorney General's Office, p.33.

became outcasts (which in effect meant that they would face a sure death alone in the wilderness). Before using such drastic sanctions, the Internet marketplace could demand of misbehaving participants to pay fines to the marketplace (comparable to the fines paid to a national state). It should be acknowledged that access denial is ineffective against one-shot rip-off artists whose fraud will not be detected until perpetrated. Nonetheless, access denial remains a powerful disincentive for repeat players because it represents a threat to their very existence in the Internet marketplace community.<sup>20</sup> In Chapter x different means of excluding certain participants are described in detail.

Also before the Internet there are examples of marketplaces opting out of the legal system. The diamond market has been thoroughly examined in an often cited study by Bernstein.<sup>21</sup> The strong social pressure created at the diamond market is at the Internet marketplace replaced by a strong technical pressure where unwanted behaviour is automatically identified and where the exclusion procedure is more transparent.

To say that many Internet marketplaces do not necessarily need the help of the national governor is not to say that it cannot benefit from belonging to a certain jurisdiction.<sup>22</sup> A typical example is the extensive SEC regulation in the U.S. At first one might believe that a marketplace would be anxious *not* to fall under such a regulatory and bureaucratic scheme. However, since the SEC regulation has created trustworthiness, a marketplace may want to signal its own trustworthiness by showing that it belongs to the U.S. jurisdiction.<sup>23</sup>

In the following I will point to some functions of the national state traditionally related to ensuring trust and confidence in marketplaces and explain to what extent these functions can be managed by the Internet marketplace without the help of the national state.

### 2.3.1 *Default Rules*

The national governor has often served an important service to the citizens by providing default rules that stipulate what the parties should do in the absence of a particular contractual agreement. The default rules in private law were of great value since they lowered the costs of concluding agreements. The parties did not need to agree on all terms, since they were already provided by the default rules in national law.

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<sup>20</sup> Paula Selis & Anita Ramasastry & Charles S. Wright, Bidder Beware. Toward a fraud-free marketplace – nest practices for the online auctions industry, a Report for the State of Washington Attorney General's Office, p.33.

<sup>21</sup> Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 Journal of Legal Studies 115 (1992), reprinted in part in Randy Barnett, Contracts: Theory and Doctrine 1995.

<sup>22</sup> Coase argues that "economists observing the regulation of ... exchanges often assume that they represent an attempt to exercise monopoly power and restrain competition. They ignore, or at any rate, fail to emphasize an alternative explanation for these regulations: that they exist to reduce transaction costs and therefore to increase the volume of trade." Coase, R.H. The Firm, the Market, and the Law, Chicago, University of Chicago Press 1988, Chapter 9. Johnson and Post say that "...insofar as consensually based "law of the Net" needs to obtain respect and deference from local sovereigns, new Net-based lawmaking institution have an incentive to avoid fostering activities that threaten the vital interest of territorial governments." Johnson, David R., and Post, David G., The Rise of Law in The Global Network in Borders in Cyberspace, Ed. by Brian Kahin and Charles Nelson, MIT Press, 1999, p. 18.

<sup>23</sup> Sculley & Woods, B2B Exchanges, ISI Publications, USA 1999, p. 150.



The default rules in private law were codified quite in parallel with the development of the industrialist-capitalist society (starting in the mid 19<sup>th</sup> century and really taking off at the beginning of the 20<sup>th</sup> century). The industrial-capitalist society was characterised by mass-transactions and scale efficiency. The information age is often said not to carry these characteristics. At least the new information technology makes it possible to tailor transactions and create scale-efficiency at a lower level than in the industrial-capitalist society. At Internet marketplaces it is rather easy to stipulate and customise efficient rules for different types of transactions. Thus appropriate rules can be developed by the marketplace at relatively low costs without the help of the national governor. A legislature is rarely able to successfully codify very specific default rules for different branches without running into complicated questions of definitions and scope of application. A legislature therefore often has to lay down rather general rules, whereas an Internet marketplace can establish rules that are specifically aimed at and adopted for a particular type of transaction.

### 2.3.2 *Mandatory Rules to Ensure Fairness*

In the late 20<sup>th</sup> century many mandatory rules were enacted with the aim to protect weaker parties (mainly within the area of consumer law but also for business to business transactions). This regulation ensured trust for situations where the market forces were not strong enough to create fair rules. (NOTE TO ATIYAH) The operator of an Internet marketplace can as an independent third party require of the participants to include in their Conditions of Sale certain types of clauses. This, in a way, can be said to be norms of mandatory nature. The reason for the marketplace to have such requirements is the same as in the national state: To ensure fairness and trust, which in turn is essential to attract liquidity. It is not likely that an Internet marketplace will have as extensive mandatory regulation as a national state. (See chapter on applicable law) But the Internet marketplace does not *need* the *help* of the national state to ensure fairness by mandatory regulation. Another thing is that the national state's ability to reach out in cyberspace with more mandatory protection than the marketplace considers necessary is very limited.

### 2.3.3 *Dispute Resolution*

Another important service of the national governor is to provide means for the citizens to resolve their disputes, normally by national courts. The courts are usually financed and administered by the state. Dispute resolution between individuals may, however, be handled with or without the help of the national governor. It is quite common in business relations to stipulate in contracts that conflicts shall be solved privately by arbitration, without the help of national courts (by for instance a permanent arbitration tribunal connected to the marketplace). It is not surprising that conflicts at Internet marketplaces (between participants at the marketplace or between the marketplace itself and the participants) frequently are solved by arbitration procedures set up according to the rules of the marketplace (see chapter x). We see that the help of the national governor is not needed for the Internet marketplace with respect to dispute resolution among participants.

#### 2.3.4 *Enforcement of Court Decisions and Arbitral Awards*

Another traditionally important task for the national governor is to execute and enforce court decisions and arbitral awards. State authorities (such as the bailiff) can enforce court decisions that the parties do not follow voluntarily. If an arbitration award is not adhered to voluntarily, most national states have legislation acknowledging arbitral awards and making them enforceable. Internationally, many states have ratified the New York Convention 1958 on Recognition and Enforcement of Foreign Arbitral Awards according to which international arbitral awards are enforceable.<sup>24</sup>

Since an Internet marketplace has no authority to physically take possession of property that somebody else is in possession of, one might have thought that the help of the national governor is necessary to efficiently enforce arbitral awards. An Internet marketplace can, however, to some extent rely on the threat of denying access for participants who do not adhere to arbitral awards. It is thus not always necessary to rely on the help of the national governor's ultimate threat of using physical violence to achieve "voluntary" execution of the arbitral award. In some instances the threat of access denial might not be severe enough and the participant entitled to damages may need a national authority (such as a bailiff) to help him enforce an arbitral award. Normally, a national state would recognise the award and enforce it when the arbitration procedure is in accordance with the requirements in the New York Convention.<sup>25</sup>

#### 2.3.5 *Prevention of Transactions in Stolen Goods*

The national state often functions as a safeguard of ownership by preventing crimes aimed at ownership by (among other things) making it difficult to trade stolen goods. There is no doubt a risk that stolen goods will be (and already are) put into circulation at Internet marketplaces.<sup>26</sup> The Internet makes it possible to easily communicate with businessmen and consumers interested in certain products and services. It is likewise easy for criminal elements to gather and find each other and form communities for criminal activities and to cheat honest people to buy stolen goods. On the Internet criminal elements are able to communicate more easily with a greater number of criminals and they also have ample possibilities of hiding or disguising their communication from the police. To my knowledge the police authorities all over the world are much concerned by this problem. It must, however, be emphasised that the problem of gatherings of criminals and criminals cheating honest people are not new phenomena, but have existed always. We ought to be very careful before our ambition to prevent crime also prevents development of efficient business procedures conducted by honest entities.

Auctions for antiques have long since faced the problem of stolen goods being offered for sale. There are examples of the national state trying to prevent this from happening by licensing auctioneers and obliging them to produce catalogues of the offered goods and information about ownership (see for instance the

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<sup>24</sup> [www.unictr.org](http://www.unictr.org).

<sup>25</sup> Arbitration held on-line might give rise to complications in applying the New York Convention. This issue will be analysed in a following chapter on arbitration.

<sup>26</sup> Investigations show that online auction complaints represent the largest category for Internet fraud statistics. See [www.fraud.org/internet/lt00totstats.htm](http://www.fraud.org/internet/lt00totstats.htm).

English Act from the 18<sup>th</sup> century referred to below). In other states it has not been considered necessary to introduce such legislation, since it is often in the interest of a serious auctioneer that his marketplace is well reputed and not associated with crime. A serious Internet marketplace would to a large extent be willing to co-operate with the police in order to prevent the types of crimes that may destroy the good reputation of the market place.<sup>27</sup>

The national states can by different means try to convince the Internet marketplaces that it is of value to help the police out. It is highly probable that we will find Internet marketplaces developing a symbiotic relationship to national police over the world. It is generally in the interest of Internet marketplaces to promote an environment where participants can feel that their ownership is safeguarded and that their transactions are valid and not the result of criminal activity.<sup>28</sup> The fact that some Internet marketplaces are unwilling to provide information to the police and that most Internet marketplaces are unwilling to participate in police work related to crimes that do not affect the trustworthiness of the marketplace must not be used as an argument to regulate all Internet marketplaces.<sup>29</sup>

### 2.3.6 Collusion and Anti-trust

A task that may sometimes be difficult to manage by the marketplace itself is preventing collusion among participants who thereby destroy the efficient competition (by for instance forming a cartel). In the traditional setting such behaviour was controlled by anti-trust and competition law. With the aid of administrative controlling bodies the national state searched for unlawful collusion and imposed severe effects for breach of the regulation.

There are three main disadvantages connected to this scheme. *First*, it is complicated for the national regulation to reach out when the collusion is committed from a location abroad. When the Internet is used as a marketplace there are greater possibilities to locate a marketplace in a state not having a severe regulation on anti-trust. *Second*, it can be put into question whether it is fair to charge all the taxpayers in a national state with the cost for administration and control of the anti-trust regulation. It would be preferable if the cost were borne by the participants protected by the regulation. This is particularly so in an international setting (where taxpayers in small states may otherwise unjustifiably benefit from the larger states' financing of administration and control). *Third*, the anti-trust regulation of a national state necessarily needs to be general in nature. Different types of transactions are differently exposed to the risks and types of

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<sup>27</sup> Florida has introduced an online record system to allow users to enter identification numbers for everything from appliances to cars to see if they have been reported as stolen. If an item turns up in the database, users can click on it and e-mail a tip to the police, potentially receiving a tipper's reward of up to \$1,000. The web site lets the public check to see if someone they know has been reported missing or is wanted by law enforcement agencies. Further information may be found at <http://www.computeruser.com/news/00/10/13/news12.html> (November 2000).

<sup>28</sup> Paula Selis & Anita Ramasastry & Charles S. Wright, Bidder Beware. Toward a fraud-free marketplace – nest practices for the online auctions industry, a Report for the State of Washington Attorney General's Office p. 37.

<sup>29</sup> A particular area where it can be assumed to be particularly difficult to achieve co-operation between the national police and Internet marketplaces is tax evasion. I will refrain from going further into the topic of tax law and the huge challenges and changes the new means of international electronic communications are causing tax law.

collusion and this points in favour of regulating the problem at a local level (i.e. by the marketplace itself forbidding collusion in the Membership Terms).

An Internet marketplace can to a large extent deal with unwanted collusion by itself. Very often it is in the interest of the marketplace to have severe rules against collusion. If it becomes known among the participants that collusion occurs at the marketplace, it loses its trustworthiness and – as said earlier – this is crucial for an Internet marketplace. By having Membership Terms or Conditions of Sale forbidding collusion and stipulating severe consequences (fines or denial of access) of breach against such rules, there is a strong incentive on participants not to collude (see chapter x).

There are cases when an Internet marketplace cannot prevent collusion by itself. For certain types of markets, there are so few sellers or buyers that denying access of a particular participant leads to the death of the marketplace (without the important participant no one is likely to want to make transactions at that marketplace). In such situations there is no way of replacing the national state regulation preventing collusion.

National regulation on anti-trust may be to some extent ineffective in cyberspace (as is the case at the traditional marketplaces) but it is at least better than nothing. A globally enacted treaty against collusion would to a large extent enhance the effectiveness of national regulation. It should, however, be emphasised that for most types of transactions the marketplace itself has enough interest, power and influence to effectively prevent collusion.

## 2.4 Abuse of Autonomy

The power of an autonomous marketplace in cyberspace could be abused by, for instance, denying access to certain persons or charging unreasonably high participation fees.<sup>30</sup> There are two schools of thoughts as to how abusive power ought to be tamed and dealt with; the market oriented view and the regulatory view.

### 2.4.1 *The Market Oriented View*

According to the market oriented view, a marketplace abusing its power by wrongfully denying access to well behaving participants or charging too high fees (or bribes) for participation would soon face competition from other marketplaces offering a platform more in harmony with what the participants perceive as fair. The market forces create an incentive on marketplaces to apply non-abusive rules for participation and to keep the costs of participation low.<sup>31</sup>

At traditional marketplaces there were substantial barriers against establishing a competitive marketplace. These barriers consisted of geographical changes, travel expenses, costs for physically building the marketplace and costs for making the

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<sup>30</sup> For an analysis of abuse from a competition and anti-trust law point of view, Robert B. Bell, William F. Adkinson, Jr., *Antitrust Issues Raised by B2B Exchanges*, Antitrust, Fall, 2000, pg. 18.

<sup>31</sup> See Johnson, David R., and Post, David G., *The Rise of Law in The Global Network in Borders in Cyberspace*, Ed. by Brian Kahin and Charles Nelson, MIT Press, 1999, p. 32 referring to Tiebout's idealised model for optimal allocation for locally produced public goods provided by small jurisdictions competing for mobile residents (Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956)).

new marketplace known. An Internet marketplace wanting to compete with an existing marketplace still faces barriers, but these are easier to overcome. It is relatively inexpensive to build the technical platform for the competing marketplace,<sup>32</sup> the participants need not physically travel from one geographical area to another, information about the new marketplace can be spread quickly, efficiently and at low cost. It must, however, be acknowledged that there still are inconveniences in shifting from one marketplace to another.

The threat of the establishment of a competing marketplace has a preventive effect and in a case where a dominating marketplace is abusing its power, new marketplaces will provide an alternative and a solution. The fact that switching from one marketplace to another is not very easily done is efficient from an economic point of view and provides incentives for participants to express how the marketplace can be improved (the intricate relationship between exit, voice and loyalty).<sup>33</sup> We see that the market forces are able (at least in theory) to prevent autonomous Internet marketplaces from exercising abusive power and that in practice the market forces will function more efficiently in the Internet environment than in physically located marketplaces.<sup>34</sup>

#### 2.4.2 *The Regulatory View*

Many would argue that it is only in theory that the competing marketplace could be established as an alternative to an abusive dominating marketplace.<sup>35</sup> There is according to this opinion no real incentive on the Internet marketplace to abstain from abusing its strong position. Consequently, the autonomous Internet marketplace must be controlled and regulated in order to protect the participants and “outcasts” from being abused. There are three main problems related to control of Internet marketplaces:

Who should exercise this control - the national governor? And, if so, which nation’s governor? One could dream of assembling all the nations of the world and creating a common regulation for control of Internet marketplaces. If ever possible to achieve, it will most probably take a couple of decades before such a global regulation is agreed upon.

The control against abusive behaviour needs to be of a prohibitive and mandatory nature. Such a structure might function as a hinder against the flexibility of

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<sup>32</sup> Ruben Lee, *What is an Exchange? The Automation, Management and Regulation of Financial Markets*, Oxford University Press, 1998, p. 32 and 55.

<sup>33</sup> Albert O. Hirschman, *Exit, Voice and Loyalty*, Harvard University Press, 1969.

<sup>34</sup> “In an environment in which there is rivalry between trading systems, it is hard to conceive of any exchange or trading system, whatever its governance structure, that might not seek to attract order flow. The pursuit of this goal is likely to lead to the optimal provision of the desired regulatory objectives. Any action by an exchange that adversely affects the quality of its market increases the possibility that competing trading systems will be able to attract order flow away from the exchange. An exchange will therefore have an incentive to adopt whatever level of transparency best enhances market quality. This does not imply, however, that an exchange will always choose a market architecture with full transparency.” Ruben Lee, *What is an Exchange? The Automation, Management and Regulation of Financial Markets*, Oxford University Press, 1998, p.260-261.

<sup>35</sup> The traditional marketplace has benefits compared to newcomers. Particularly important in this respect is the “network externality”. Furthermore, successful competition by other marketplaces requires fungibility or mutual off-set arrangements between the competing marketplaces’ clearinghouses (if the objects for sale need to be registered or “cleared”). Ruben Lee, *What is an Exchange? The Automation, Management and Regulation of Financial Markets*, Oxford University Press, 1998, p. 55. For a regulatory approach see John Goldring, *Netting the Cybershark: Consumer Protection, Cyberspace, the nation-State, and Democracy*, in *Borders in Cyberspace*, Ed. by Brian Kahin and Charles Nelson, MIT Press, 1999, pp.323 – 354.

different marketplaces and the free developments and improvement of existing marketplaces.

A scheme of control is bound to create administration and bureaucracy, which is costly and time consuming. The costs will ultimately be borne by either the taxpayers in the state exercising the control or by the participants at the marketplace.

### 2.4.3 Conclusion

We see that, at least in theory, the market forces are likely to prevent an autonomous marketplace from abusing its power.<sup>36</sup> We also understand that there are problems of controlling the power of the Internet marketplace relating to the legitimacy of the controlling body, the costs occurring due to the control and the preservatory effect of mandatory and regulatory schemes. Strange says: “(T)he authority of the governments of all states, large and small, strong and weak, has been weakened as a result of technological and financial change and of the accelerating integration of national economies into one single global market economy.”<sup>37</sup> Sandel says: “The hope for self-government today lies not in relocating sovereignty but in dispersing it. The most promising alternative to the sovereign state is not a cosmopolitan community based on the solidarity of humankind but a multiplicity of communities and political bodies – some more extensive than nations and some less – among which sovereignty is diffused. Only a politics that disperses sovereignty both upward (to transnational institutions) and downward can combine the power required to rival global market forces with the differentiation required of a public life that hopes to inspire the allegiance of its citizens.”<sup>38</sup>

Studies show that self-regulation may lead to cartels and monopolies since it has an excluding function – that is to say, the self-regulatory scheme excludes companies not participating in the scheme (NOTE ask Schäder). At Internet marketplaces that are anxious to attract liquidity (many participants and many transactions) it is not likely that monopolies will develop even if the marketplaces are based on self-regulatory schemes. The need to attract liquidity will balance and thwart the tendency to exclude competitors.

In my opinion, national states ought to rely on the market forces and only intervene with controlling schemes when abuse is actually taking place and is of such importance that it threatens fundamental societal interests. I am aware of that not everyone agrees with this view. Again, I would like to emphasise that my opinion only refers to regulation of marketplaces where commercial dealings are conducted (I do not examine other Internet-phenomena).

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<sup>36</sup> For a more in depth description of the market forces in relation to the development of competing marketplaces see Ruben Lee, *What is an Exchange? The Automation, Management and Regulation of Financial Markets*, Oxford University Press, 1998, Chapters 4 and 5.

<sup>37</sup> Susan Strange, in *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press 1996 p. 14. See also Richard Rosecrance who in the 1980s envisioned the rise of the “trading state”, *The Rise of the Trading State* (New York: Basic Books 1986).

<sup>38</sup> Sandel, *America’s Search for a New Public Philosophy*, p. 73 KOLLA UPP BOKEN!

## 2.5 Democracy at Internet Marketplaces

Another problem with the autonomous Internet marketplace is the apparent lack of democracy. In the democratic national state, legislation is decided by the parliament. At an Internet marketplace the operators of the marketplace set the rules. Who actually owns and governs the Internet marketplace may differ. Sometimes the participants own it; at other times an independent body owns it.<sup>39</sup>

The national parliament derives its legitimacy from the constitution, which usually includes stipulations on how the members of the parliament are elected and what power the parliament has. Since a parliament has high legitimacy, it may successfully enact legislation that is followed also by citizens who do not sympathise with the particular legislation.

At an Internet marketplace the designer of norms (the marketplace operator) lacks legitimacy in the democratic sense. Participants adhere to the rules set by the operators of the marketplace not because these decision-makers are elected, but for pure economical reasons. By contracting to participate at the marketplace the participants accept to be bound by the rules of the marketplace (alterations in the rules are also made by contract). If a participant does not approve of the rules, he is free not to participate (exit). A marketplace's legitimacy is based on economic attraction and not on democratic principles. It may, consequently, be put into question whether democracy is at all needed at a marketplace.<sup>40</sup> Post has said: "There has always been a strong fictional element to using this notion of a social contract as a rationale for a sovereign's legitimacy. When exactly did you or I consent to be bound by the US Constitution?... But in cyberspace there is an infinite amount of space, and movement between online communities is entirely frictionless. Here, there really is the opportunity to a social contract; virtual communities can be established with their own particular rule-sets, power to maintain a degree of order and to banish wrongdoers can be lodged, or not, in particular individuals or groups, and those who find the rules oppressive or unfair may simply leave and join another community (or start their own)."<sup>41</sup>

In a democratic national state, the principle of equal treatment of citizens is of fundamental nature. Is this difference between the marketplace and the national state a problem? Well, yes it is. At a marketplace it is not necessary to treat everybody equally. There is always a risk that the market forces are not strong enough to take care of the occasional maltreatment of small participants at a marketplace. The idea of unequal treatment depending on economical strength is offensive to many in principle. Although we in many situations actually do accept that money results in better service (take for instance the case of paying for a business class ticket as opposed to an economy class ticket for air travel). It would, however, be hard to accept a situation where poor people were not allowed to buy business class tickets.

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<sup>39</sup> Sculley & Woods, B2B Exchanges, provides examples of successful and unsuccessful ownership constellations. See also Ruben Lee, What is an Exchange? The Automation, Management and Regulation of Financial Markets, Oxford University Press, 1998, for an analysis of governance of exchanges.

<sup>40</sup> An advocate for the need for democracy in Internet business transaction is John Goldring, Netting the Cybershark: Consumer Protection, Cyberspace, the nation-State, and Democracy, in Borders in Cyberspace, Ed. by Brian Kahin and Charles Nelson, MIT Press, 1999, p. 351.

<sup>41</sup> David G. Post, The State of Nature and the First Internet War, Reason, Apr. 1996, p. 33.

In comparing the equal treatment of marketplace participants and citizens in a national state we must acknowledge that the principle of equal treatment is not always upheld in practice in the national state. It is a well-known fact that poor and uneducated citizens in practice face huge problems exercising their legal rights. Both the national state and Internet marketplaces normally have incentives to treat all citizens/participants equally. If the national state fails to do this it can be taken to the courts of constitutional or human rights and exposed to international humiliation. In extreme cases a national state neglecting the need to treat citizens equally might face a revolution, or less severely, the government may lose the next election. If an Internet marketplace fails in treating everybody equally, it runs the risk of being exposed to negative critique and eventually to lose its participants to competing marketplaces.

There are incentives both on national states and Internet marketplaces to treat all citizens/participants equally. But in practice it may be that not all citizens/participants are strong enough to pursue their rights in this respect. However, I do not think that the risk of unequal treatment is greater at the Internet marketplace than in the national state. The disincentives preventing unequal treatment appear to be of equal importance at both places.

There are private institutions that lack legitimacy in the way they produce norms and whose participants have no choice of using a competitor.<sup>42</sup> For such institutions the problem of democracy is relevant. The marketplaces examined in this study are not monopolistic in nature, and thus the market forces are likely to handle the problem of non-democratic norm design.

## 2.6 Future Regulation of Internet Auctions and Exchanges

National states have long since been keen to regulate auctions and exchanges. This chapter intends to make a prognosis as to what extent national regulation of auctions and exchanges will be made in the future by pointing to some issues that have been regulated historically.

In France auctions have been heavily regulated by legislation requiring the auctioneers to have licenses. Until quite recently, only French citizens had the right to conduct auctions in France.<sup>43</sup> Also in Germany auctioneers need to be licensed. In the electronic environment it is complicated for a national state to impose licensing requirements since it is difficult to determine under which jurisdiction a marketplace falls. Two German cases illustrate this problem and it was decided that they did not require to be licensed.<sup>44</sup>

Licensing of auction firms started in England 1779 mainly with the aim to facilitate for the exchequer to collect revenues. The legislation also intended to prevent frauds by stipulating that a catalogue approved by the sheriff must be

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<sup>42</sup> Marsden gives ICANN as an example of such an institution in *Regulating the Information Society*, Routledge 2000, p. 31.

<sup>43</sup> Brian Learmount, *A History of the Auction*, Bernard & Learmount, London 1985, pg. 128

<sup>44</sup> Landgericht Wiesbaden Urteil vom 13. Januar 2000 and Landgericht Münster 4 0 424/99 Urteil vom 21. Januar 2000.



produced to ensure to whom the property sold belonged.<sup>45</sup> The Auctioneers Act from 1845 obligated the auctioneer to provide his name and place of residence in order to reduce malpractice. As described above, Internet marketplaces are likely to try to prevent fraudulent transactions without the help of the national state. The question of collecting revenues based on Internet transactions has already proved to entail problems in practice. It is not likely that the national state in the future will successfully be able to implement efficient taxation of Internet marketplaces without doing it by global multilateral treaties.

We also find ample examples of national regulation of auctions in relation to default rules in contract law (for instance, about the right of withdrawal and the effect of the fall of the hammer). Such legislation is also tied to fundamental problems of applicable law and efficient national sanctioning. It is likely that such provisions in law will not be frequent in the future.

A striking and world-wide phenomenon is the national legislative regulation of stock exchanges (and other exchanges for financial instruments). These regulations are based on the presumption that the market forces are not strong enough to easily provide competing stock exchanges in case the dominating stock exchange is misbehaving. In fact, not many years ago states often granted stock exchanges a monopoly. This was considered efficient since the establishment of a single exchange lead to high liquidity (many transactions at one place) which is efficient. Furthermore, the purpose of legislation related to stock exchanges was to secure trust in the financial market, since lack of such trust might affect the whole society negatively. Nowadays, these basic reasons for regulating stock exchanges and granting exchanges monopolies are of less importance. There is room for many stock exchanges in the world and enough liquidity in each of them due to the whole world - and not only a single nation's citizens - being the possible participants. As described earlier, it is less difficult to establish a competing marketplace in the electronic environment. Due to the competitive structure a marketplace is forced to create trustworthiness by itself by not acting abusively. The only remaining reason for regulating stock exchanges by national legislation is to "help" the exchange to create trustworthiness. It is of outmost importance always to bear in mind the underlying reasons for introducing regulatory schemes. In these times of rapid changes it is also necessary to re-examine old regulatory schemes to check whether they are in harmony with the new *raison d'être*.

The future ability of the national legislature to prescribe mandatory legislation affecting the inner life of Internet marketplaces will probably be limited. This is due to the problems for the national state to monitor activities conducted in the a national cyberspace. An additional explanation is that a single national state hardly can claim to have any authority over an autonomous Internet marketplace. An example of legislation not likely to prevail in the Internet environment is the French and German requirements of authorisation to be able to sell new goods at an auction and the French law that auction sale of second-hand goods only may be conducted by public officers.

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<sup>45</sup> Also the Spanish Ley 7/1996 de Ordenación del Comercial Minorista Art. 58 contains a provision that the objects are properly described in order to prevent fraud. See Ataz López, J., Régimen Jurídico General del Comersio Minorista, p. 681, Mc Graw-Hill/Intermaericana de Espana, Madrid, 1999

In the U.S. auctions were viewed with much scepticism during the 19<sup>th</sup> century. Auctions were described as a monopoly and thus unjust by giving to a few what ought to be distributed among the mercantile community generally. The commission paid to the auctioneer was considered unconstitutional. Many anti-auction meetings were held and an Anti-Auction Committee was established in 1826. The reason was, among others, the fear of international competition and change in the distribution systems. The committee met resistance and did not succeed in prohibiting or limiting auctions.<sup>46</sup>

History teaches us that auctions may create hostile feelings and frustration. These feelings may be even more frustrated in a case where the national legislature is not able to “reach” the auction with its legislation. As mentioned above, the use of on-line auctions will probably lead to quite substantial changes in how to do business in the future. In the period of transition it is very likely that those who find it difficult to adapt to the changes will heavily attack the institutes of auctions and exchanges.

## 2.7 Summary and Conclusion

We are likely to see Internet marketplaces develop a mixture of autonomy and dependency on national jurisdictions.<sup>47</sup> As Reidenberg writes: “Rules and rule-making do exist. However, the identities of the rule makers and the instruments used to establish rules will not conform to classic patterns of regulation.”<sup>48</sup> What is rather new is the increased ability of an Internet marketplace to choose to what extent it allows a national jurisdiction to “interfere” or “help”.

The analysis shows that for some instances market forces are not enough to protect vital interests and national regulation is the only solution. This is the case in relation to some types of transactions exposed to a large risk of collusion, to enforcement of obligations against participants independent of the marketplace, to enhance the trustworthiness of marketplaces dealing with transactions that are sensitive to frauds, and to safeguard ownership by preventing thefts and dealings in stolen property.<sup>49</sup> Another very important task for the national governor is to

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<sup>46</sup> Brian Learmount, *A History of the Auction*, Bernard & Learmount, London 1985 pg. 84-90

<sup>47</sup> Lawrence Lessig, *Code and other Laws of Cyberspace*, Basic Books, 1999 pg. 206. (With a reference to Walter Winston, *The Twilights of Sovereignty*).

<sup>48</sup> Reidenberg, J.R., *Governing Network and Cyberspace Rule-Making* (1996) 45 *Emory Law Journal* 911 at pp. 911-12; Same author in *Governign Networks and Rule-making in Cyberspace*, in *Borders in Cyberspace*, Ed. by Brian Kahin and Charles Nelson, MIT Press, 1999, p. 96: “For global networks, governance should be seen as a complex mix of state, business, technical, and citizen forces.” See also Karnow, C., *Future Codes* (Artech House, Boston, MA, 1997) pp. 5-11, 223. As said by David Wall, *The new electronic lawyer and legal practice in the information age*, in *The Internet Law and Society*, Ed. Yaman Akdeniz, Clive Walker and David Wall, Longman 2000, p. 113: “The law itself is plural, decentralised and now comes from multiple sources with more rules and standards being applied by more participants to more varied situations, which means that legal outcomes are contingent and changing. Galanter also concluded that more outcomes are being negotiated rather than being decreed. Because law is contingent (conditional), flexible and technically sophisticated, he argues that legal work has become increasingly costly, yet desired.” With a reference to Galanter, M., *Law Abounding: Legislation Around the North Atlantic* (1992) 55(1) *Modern Law Review* 900.

<sup>49</sup> Arthur Sculley and William Woods in *Evolving E-markets: building high value B2B exchanges with staying power*, ISI publication Ltd, 2000 p.153.

facilitate and stimulate establishments of competing marketplaces. Thereby helping the market forces instead of trying to control them.<sup>50</sup>

Outside this limited area, Internet marketplaces are well suited to protect the public and internal interests by self-regulatory means.<sup>51</sup> Although we traditionally have been accustomed to national regulation, it will be of less importance. Internet marketplaces will likely solve the problems just as well - if not even better - by themselves. This is particularly the case for norms relating to contract law in the broader sense. Rules having their origin in the *lex mercatoria* are rarely of any political controversy. This factor in combination with the problems for the national governor to reach out in cyberspace, leads me to believe that such areas of law are best left to be self-regulated by the Internet marketplaces. The development of mandatory regulation of contract law (for consumer transactions as well as business to business transactions) will in the future probably be limited to crucial issues. The possibilities provided by the Internet of effective development of fair rules for consumers by means of the market forces will most likely be satisfactory for most national states.

It is crucial to identify where national regulation is needed and for the national state to concentrate its efforts within these areas. This study shows that it is in the interest of a marketplace itself to create rules and norms that protect the confidence in the marketplace and, consequently, that the marketplace itself secures the general interest of a fair and balanced structure. The study also shows that such self-regulation does not pose any dangers to society. Finally, the study points at the interdependency of Internet marketplaces and the national states.

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<sup>50</sup> Lee concludes in his extensive study on exchanges: "... and finally, implementing the joint strategy of separating the regulation of market structure from the regulation of other areas of public concern, and employing competition policy to regulate market structure. This last strategy is recommended as being the best way of classifying and regulating exchange and trading systems." Ruben Lee, *What is an Exchange? The Automation, Management and Regulation of Financial Markets*, Oxford University Press, 1998, p. 316

<sup>51</sup> "Meanwhile, the door is open for private companies to move directly into the rule-making business. Although companies cannot write the rules of intellectual property rights, they can establish rule bound areas of the Internet virtual communities. i Ert-which rules are enforced. In those areas, companies can perform the functions that government are not yet capable of fulfilling. For a fee or by contract, they can protect the rights of on-line property. Just as merchants in medieval times developed the customs and practices that eventually became commercial law in Europe, so can contemporary companies and entrepreneurs create the rules of electronic commerce." Debora Spar and Jeffrey I. Bussgang, *I29 Harvard Business Review* May/June 1996 KOLLA NAMNET PÅ ARTIKELN (LIGGER I MAPPEN I PAPPERSVERSION)